

THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PARAMOUNT PROPERTIES MANAGEMENT
GROUP, LLC

Plaintiff,

v.

DERRICK JACKSON

Defendant.

CIVIL ACTION FILE

NO: 2022CV365529

ORDER

The below referenced motions, having been scheduled on the Hon. G. Grant Brantley's Omnibus Motions Calendar on the 6th day of September 2023, and upon the call of the case, the following motions were presented before the Court: (1) Defendant's Motion to Join Indispensable Parties and Application for a Pretrial Hearing; (2) Defendant's Motion to Vacate Order on Immediate Possession Due to Failure to Comply with Order and Plaintiff's Opposition; (3) Defendant's Motion for Summary Judgment; (4) Plaintiff's Motion to Amend *Nunc Pro Tunc* the Court's December 21, 2022, Order Granting Release Funds; (5) Defendant's Motion to Strike Affidavit of Arthur McCracken; and (6) Defendant's Motion to Strike Affidavit of Marc Seals. Senior Judge G. Grant Brantley presided over the hearing on September 6, 2023.

Upon review of all of the evidence presented, upon consideration of the oral arguments presented by counsel for each of the Parties, and upon review of the entire record of the case for each of the presented motions, the Court, for the reasons set forth below, hereby (1) **DENIES** Defendant's Motion to Join Indispensable Party as **MOOT**; (2) **DENIES** Defendant's Motion to Vacate Order on Immediate Possession Due to Failure to Comply with Order; (3) **DENIES** Defendant's Motion for Summary Judgment; (4) **GRANTS** Plaintiff's Motion to Amend *Nunc*

Pro Tunc; (5) **DENIES** the Motions to Strike the Affidavits of Arthur M. McCracken and Marc Seals.

The Court further takes note that Plaintiff's Motion for Contempt, though timely filed, was not specifically referenced in the Court's hearing notice to the Parties. Consequently, Plaintiff's Motion for Contempt is scheduled on the Court's September 29, 2023, 1:30 P.M. calendar and the Parties will appear for a hearing via Zoom.

FINDINGS OF FACT

The Court makes the following findings of fact and conclusions of law. Plaintiff is a property management group and agent for Arthur and Julie McCracken ("McCrackens"). The McCrackens are the owners of the real property located at 955 Tiverton Ln, Johns Creek, GA 30022 ("Property"). On May 17, 2020, the McCrackens entered into (1) a lease ("Lease") with Defendant Derrick Jackson for the Property and (2) a separate option agreement ("Option"), where, upon the fulfillment of all the conditions precedent, Defendant could exercise the Option to purchase the Property, with earliest exercise date of the Option being May 16, 2025. One of the conditions precedent to the exercise of the Option was that at the time of exercise, the Lease needed to be in full force and effect. The Lease gave the McCrackens the right to hire a property manager at any time who was authorized to fill the requirements of the McCrackens under the Lease.

The Option and the Lease cross referenced, cross defaulted each other, and are integrated agreements. The Lease also required Defendant to remit a base rent pay of \$15,000 per month and gave either party the right to terminate the Lease by providing a sixty (60) notice to the other party. Both the Lease and the Option made it clear and unambiguous that any termination of the Lease would automatically terminate the Option.

In late 2021, a dispute arose between the McCrackens and Defendant regarding Defendant's failed obligations under the Lease causing the McCrackens to hire Plaintiff to manage the Property and protect their interests. Defendant was notified of Plaintiff's hiring on or about October 14, 2021.

The record reflects that on January 18, 2023, Plaintiff hand-delivered a demand for possession of the Property to Defendant. Defendant refused to vacate the Property. Consequently, Plaintiff initiated this action in Magistrate Court of Fulton County on January 24, 2023, the same being Case No. 22ED208510 (the Magistrate Case) (which Magistrate Case was subsequently transferred by consent to this Court). The Defendant, represented by counsel, proceeded to file an Answer and Counterclaim on February 10, 2022.

On April 5, 2022, the Magistrate Court held a hearing where Judge Todd Ashley considered evidence presented by the parties regarding the current outstanding rent due and owing by Defendant and Judge Ashley determined the amount of rent due at the time was \$85,265.52. The Magistrate Court specifically held that Defendant failed to offer any probative evidence of payments against this outstanding sum of \$85,265.52. This finding was memorialized in an Order entered on the docket on April 19, 2022.

On April 25, 2022, the Magistrate Court entered a Consent Order (the "Consent Order"), whereby the Magistrate Case was transferred in its entirety to the Superior Court of Fulton County. Pursuant to the Consent Order, Defendant was required to pay all rents due under the Lease at issue "into the Registry on or before the 17th day of each consecutive month thereafter pursuant to the terms of the Lease." Time is of the essence. The Consent Order further held that: "[I]f Defendant does not timely pay rent as specified above, Plaintiff shall be entitled to seek an

immediate Writ of Possession [for] the property located at 955 Tiverton Lane, Alpharetta, Georgia 30022” and authorized the release of \$75,000 that was then held in the Court’s registry.

After the Magistrate Court case was transferred here, this Court set the matter for a bench trial on its September 21, 2022, non-jury calendar before the Hon. Melynee Leftridge. A week before the bench trial, Defendant filed a jury demand. Upon receipt of the jury demand, the Court scheduled a pre-trial conference for October 12, 2022, and set this matter on its October 25, 2022, jury trial calendar. The Court held a pre-trial conference on October 12, 2022, and the parties were directed to submit a consolidated Pre-Trial Order. On October 18, 2022, the Court entered the Pre-Trial Order in the instant case.

On October 24, 2022, the Court received notice of Defendant’s bankruptcy filing, which automatically stayed this case. The Bankruptcy Court granted Plaintiff’s leave from the automatic stay, and Plaintiff moved pursuant to the Consent Order for an immediate writ of possession due to Defendant’s failure to remit timely rent payment for October and total failure to remit payments required under the Consent Order for the months of November and December 2022.

Finding the Defendant had violated the Consent Order, this Court granted Plaintiff’s Motion, authorized the *Writ of Possession*, authorized the release of funds held in the registry, and Ordered Defendant to pay the November and December payments totaling \$30,000.

CONCLUSIONS OF LAW

I. Motion to Join Indispensable Parties

Defendant previously filed a Motion to Join Indispensable Parties and Request for a pre-trial conference. During the September 6, 2023, hearing, Defendant withdrew his Motion to join the McCrackens, the IRS, and Bank of America. As such, this Motion is **DENIED AS MOOT**.

II. Motion to Vacate

Pursuant to Georgia law, a motion to set aside may be brought to set aside a judgment based upon: (1) lack of jurisdiction over the person or the subject matter, (2) fraud, accident or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or (3) a non-amendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show that no claim in fact existed. O.C.G.A. § 9-11-60(d).

In the present case, Defendant filed a Motion to Vacate (“Motion to Vacate”) on December 22, 2022, seeking to vacate the Court’s Order releasing all the funds held in the registry of the Court to Plaintiff and further ordering Defendant to make payments of \$15,000 for the months of November and December 2022. Defendant proceeded to dispute the release of all the funds in the registry of the Court, and states that absent a finding of a jury, the Registry “must retain \$40,264.52 of the funds after a trial on the merits.” [*Motion to Vacate*, Pg. 3]. At the hearing on September 6, 2023, Defendant proceeded to raise a due process argument and claimed that he was not aware what the \$85,264.42 that he deposited into the registry of the Court under the Consent Order represented.

The Court concludes that Defendant was provided adequate due process, and that the lack of due process argument Defendant seeks to advance lacks merit. The language of the Order entered into the docket on April 19, 2022, which this Court reviewed at the hearing on September 6, 2023, establishes the basis for the quantification of the \$85,264.42 sum that Defendant had deposited into the Court’s registry. Whether Defendant was unaware of what that sum represented is not relevant to the Court’s ruling as the Consent Order specifically and unambiguously

established Defendant's obligations and is controlling. Additionally, the Court can draw logical inferences from the evidence and since Defendant made the deposit himself, the Court has determined that the Defendant was aware what the \$85,264.42 represented.

Moreover, the Court finds that there are no other grounds advanced by Defendant supporting his motion to vacate the December 21, 2022, Order that orders that the funds held in the registry of the Court be released to Plaintiff.

Pursuant to O.C.G.A. § 44-7-54, "in any case where the issue of the right of possession cannot be finally determined within two weeks... the tenant shall be required to pay into the registry of the trial court:

(2) *"All rent and utility payments which are the responsibility of the tenant payable to the landlord under terms of the lease allegedly owed prior to the issuance of the dispossessory warrant... In the event that the amount of rent is in controversy, the court shall determine the amount of rent to be paid into court in the same manner as provided in paragraph (1) of this subsection."*

O.C.G.A. §44-7-54(a)(2).

In the event the tenant fails to pay "any payment as it becomes due... the court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff, the deputy or the constable." *Id.* at (b). The failure to pay rent into the court "entitles the property owner to an immediate writ of possession and disbursement of funds as a non-jury matter. *Bellamy v. F.D.I.C.*, 236 Ga. App. 747, 752 (1999).

Contrary to Defendant's contention, and as the hearing transcript of the Magistrate Court proceeding and the previous Order evidence, the parties, each being represented by counsel, had ample opportunity to present evidence as to the amounts owed by Defendant. After the Magistrate

Court considered the evidence presented, it was determined that the outstanding rent was \$85,264.52. The Parties subsequently entered into the Consent Order, whereby Defendant deposited the \$85,264.52, and also agreed to continue making the monthly payments under the Lease. These payments, per the Lease, were \$15,000 per month. Time being of the essence was a specific provision contained in the Consent Order.

Defendant proceeded to make monthly payments of \$15,000 but did not make any of the required payments for the months of November and December of 2022. Based on Defendant's failure to pay the Court ordered payments, the Court issued the *Writ of Possession*, and the disbursement of funds became a non-jury matter for the Court to decide. *See* O.C.G.A. §44-7-54(b); *Bellamy v. F.D.I.C.*, 236 Ga. App. 747, 752 (1999). As such, the Court authorized the release of the \$115,264.52.

The Court further directed Defendant to pay \$15,000 for November and December 2022 by December 31, 2022, sums which Defendant has never paid. It is well-established that the Superior Courts of this State have the "power" to grant relief to "effectuate" its judgment. Georgia Constitution Art. VI, par. IV. The Consent Order that transferred this matter to this Court became an Order of this Court. Pursuant to the Consent Order, Defendant was required to make monthly payments by the 17th of the month, time being of the essence. Defendant remained in possession during the months of November and December but did not pay any rent for those months' contrary to the Consent Order requirements. As a result, the Court is within its authority to enforce its own Orders and Order Defendant to pay the \$30,000 rents due for November and December 2022.

For the reasons stated, Defendant's Motion to Vacate is **DENIED**.

III. Motion for Summary Judgment

On a motion for summary judgment, the burden is on the movant to show that no jury question remains, and that the movant is entitled to judgment as a matter of law. O.C.G.A. §9-11-56(c). A Defendant moving for summary judgment needs to point out by reference to evidence in the record that there is an absence of evidence to support any essential element of the non-moving party's case. *Giddens v. Metropower, Inc.* 366 Ga. App. 15, 15-16 (2022). Only after the movant discharges its burden, is the non-movant required to come forward with evidence giving rise to a triable issue. *Wellstar Health Sys., Inc. v. Painter*, 288 Ga. App. 659, 660, 655 S.E.2d 251, 252 (2007). In reviewing a Motion for Summary judgement, the Court must view the evidence, and all reasonable inferences drawn from therefore, in the light most favorable to the nonmovant. *Parrish v. Chrysler Fin. Servs. Americas, LLC*, 332 Ga. App. 683, 683, 774 S.E.2d 746, 746 (2015).

In the present case, Defendant argues (1) that it is entitled to summary judgment “because (a) Plaintiff is not Defendant’s landlord and there is no privity of contract between Plaintiff and Defendant, and (b) proper notice were not provided to Defendant prior to filing this lawsuit, and (2) that there does not exist an actual controversy between the parties.

Other than making a conclusionary statement that Defendant is entitled to summary judgment because Plaintiff is not his landlord, Defendant offers scant evidence or legal analysis in support of this argument. In contrast, the Court notes that pursuant to the Lease, the McCrackens had the contractual right to hire a property manager. The McCrackens exercised that contractual right by hiring Plaintiff to assist with the management of the Property. Plaintiff, acting in the McCrackens stead, had both contractual authority and the statutory authority to demand possession and bring this lawsuit as an agent of the McCrackens. *See* O.C.G.A. § 44-750; *See Gleaton & Assocs., Inc. v. Cornelius*, 366 Ga. App. 712, 717, 884 S.E.2d 103, 109 (2023).

Next, Defendant argues that proper notice was not filed prior to Plaintiff filing this lawsuit. The uncontradicted evidence establishes that Defendant waited to file its Motion for Summary Judgment after Defendant was evicted from the Property. In effect, Defendant is attempting to unring a bell.

Upon review of the entire record of the case, and considering the evidence presented and hearing the arguments of counsel, it is clear to the Court that Defendant received proper demand for possession. In Georgia, a demand for possession is a condition precedent prior to filing a dispossessory action. O.C.G.A. §44-7-50(a). “In all cases when a tenant ... fails to pay rent when it becomes due... such owner may individually or by an agent, attorney in fact, or attorney at law, demand possession of the property so rented.” *Id.* If the tenant refuses or fails to deliver possession when so demanded the owner or the agent for such owner may swear out a dispossessory affidavit as to the facts in the district where the land lies. *Id.*

The record reflects that from October of 2021 through January 18, 2023, Marc Seals, the manager for Plaintiff, delivered three separate demand notices to the Property. The third demand notice was hand-delivered to Defendant on January 18, 2022, whereby Defendant was given three (3) days to pay or quit. That is, Defendant had three days to pay his outstanding rental obligation, or he was required to vacate the Property. In this case, the record reflects Defendant did neither – he did not vacate the Property or pay the outstanding balance within three (3) days of receipt of notice.

Defendant disputes the validity of the hand-delivered notice on January 18, 2022. This argument fails as a matter of law. The Court of Appeals has previously held that a letter of notice that tenant must surrender possession and quit the premises if rent due and owing is not paid within

three (3) days is sufficient notice of demand for possession under O.C.G.A. § 44-7-50. *Sandifer v. Long Invs., Inc.*, 211 Ga. App. 757, 758, 440 S.E.2d 479, 481 (1994).

Moreover, the Consent Order specifically allowed Plaintiff to seek an immediate *Writ of Possession* should Defendant fail to make monthly payments as required by the Consent Order. This is consistent with O.C.G.A. § 44-7-54.

In passing, Defendant argues that Plaintiff cannot show that the Lease and Option Agreement have terminated. The evidence establishes otherwise. The record reflects a Lease and Option Agreement termination letter that was sent via certified mail and via email to Defendant and his counsel. Although Defendant attempts to argue that he did not receive the Lease and Option Agreement termination via certified mail and further disputes the validity of the email address used for him, Defendant's arguments are unavailing as the record clearly and undisputedly establishes that the Lease and Option termination notice was sent to and received by Defendant's then current lawyer.

Well-established case law in Georgia is absolutely clear. Notice to a lawyer is deemed valid notice to the client. *Outfront Media, LLC v. City of Sandy Spring*, 356 Ga. App. 405, 414 (2020). This applies even in the context of real estate cases. *Id.* Thus, there are no facts in dispute on the issue that Defendant received notice of the Lease and Option Agreement termination letter. The Court further finds that both the Lease and the Option have been terminated as a matter of law.

Based on the foregoing, the Court determines that Defendant has failed to meet his legal burden required to succeed on Summary Judgment; therefore, Defendant's Motion for Summary Judgment is **DENIED**.

IV. Motion to Amend *Nunc Pro Tunc*

It is well-established that this Court has power to amend its Orders *nunc pro tunc* to correct inadvertent errors or omissions in the record to reflect the truth of what happened. *Andrew L. Parks, Inc. v. SunTrust Bank*, 248 Ga. App. 846, 847, 545 S.E.2d 31, 33 (2001); *Georgia Tile Distributors, Inc. v. Zumpano Enterprises, Inc.*, 205 Ga. App. 487, 492, 422 S.E.2d 906, 909 (1992).

Plaintiff's Motion *Nunc Pro Tunc* brings to the Court's attention that the December 21, 2022, Order releasing the funds in the registry did not reference the Magistrate Case number. Due to this omission, the registry refused to release the funds to Plaintiff. The Court seeks to and does rectify this ministerial omission by granting Plaintiff's Motion to Amend *Nunc Pro Tunc*.

Thus, the Court hereby **GRANTS** Plaintiff's Motion to Amend *Nunc Pro Tunc* and entered an Order Amending *Nunc Pro Tunc* on September 6, 2023.

V. Motion to Strike Affidavits

The Defendant filed Motions to Strike the Affidavits of Arthur M. McCracken and Marc Seals, and Plaintiff has filed a Response in Opposition to each respective Motion to Strike. At the hearing on September 6, 2023, Defendant informed the Court that it no longer needed oral arguments on its Motions to Strike.

The Court has reviewed the Affidavits and **DENIES** Defendant's Motions to Strike the Affidavits of Arthur McCracken and Marc Seals.

IT IS HEREBY ORDERED, that Defendant's Motion to Join Indispensable Parties is **DENIED AS MOOT**;

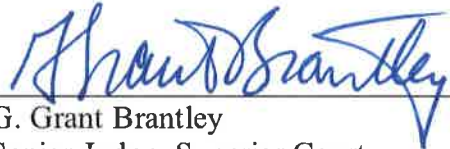
IT IS FURTHER ORDERED, that Defendant's Motion to Vacate is **DENIED**;

IT IS FURTHER ORDERED, that Defendant's Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED, that Plaintiff's Motion to Amend *Nunc Pro Tunc* is **GRANTED**;

IT IS FURTHER ORDERED, that the Defendant's Motions to Strike the Affidavits of Arthur M. McCracken and Marc Seals is **DENIED**.

SO ORDERED this 25th day of September 2023



G. Grant Brantley
Senior Judge, Superior Court
Fulton County, GA

Prepared by:

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