

Your Tenant Has Left the Building.

Now What?

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I. INTRODUCTION

Unfortunately, not every tenant is a model one. Landlords often must think about removing the unsuitable tenant or what to do when the tenant ups and leaves. When tenant problems arise, the first thing a landlord should do is turn to the lease. The lease often dictates the tenant's obligations and the landlord's remedies if a breach occurs. Georgia's body of law that has developed in the arena of landlord-tenant relations borrows heavily from principles of contract law. If there is a question as to the meaning of the lease, Georgia's landlord tenant law states that leases are to be interpreted under the applicable rules of contract construction.¹ Georgia courts also apply the contractual principles of good faith and commercial reasonableness to leases, and the foundation of

¹ See, e.g., *May Dept. Store v. Center Developers, Inc.*, 266 Ga. 806, 810, 471 S.E.2d 194, 198 (1996).

the defense of constructive eviction on the contractual principle of failure of consideration.²

This paper will focus on the considerations a landlord has when a tenant abandons the premises. First, the landlord must understand how a lease may be terminated. Second, landlords must know what actions will constitute abandonment and what options a landlord has if the tenant leaves early. Third, if the tenant does not abandon the premises, but holds over past the lease terms, the landlord needs to know what is required before eviction. Fourth, all landlords should know what actions may subject him to charges for forcible entry. Finally, if the tenant leaves property behind, the landlord must determine what type of property it is to know what his rights are with respect to the property.

II. HOW THE TERMINATION OF LEASEHOLDS WORKS

Generally, the terms of the lease dictate when and who may terminate a lease. For example, generally, the lease will state that a breach of any of its terms entitles the landlord to terminate the lease and/or demand possession. The lease may provide that the tenant can terminate the lease early by providing written notice to the landlord. Alternatively, both the landlord and tenant may mutually agree to terminate the lease early. Finally, leases may terminate at the conclusion of the lease term.

Most leases contain a contractual provision granting the landlord the right to terminate the lease upon breach by the tenant. Georgia courts generally will enforce such a provision.³ Termination pursuant to the terms of the lease must be accomplished in accordance with those lease provisions. The majority of lease termination provisions contain a requirement that a landlord give a tenant notice of the breach and an

² *Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc.*, 176 Ga.App. 586, 596, 337 S.E.2d 29, 37 (1985); *Piano & Organ Center, Inc. v. Southland Bonded Warehouse, Inc.*, 139 Ga.App. 480, 482, 228 S.E.2d 615, 617 (1976).

³ *Wig Fashions, Inc. v. A-T-O Properties, Inc.*, 145 Ga. App. 325, 243 S. E. 2d 526 (1978).

opportunity to cure the breach before termination is effective. Alternatively, many leases allow for the immediate termination of a lease for the non-payment of rent. Again, the terms of the lease will ultimately control.

Landlords should not jump too quickly to terminate the lease. Once the lease is terminated, generally the tenant's obligation to pay rental amounts ends.⁴ Therefore, a landlord may choose not to terminate the lease and continue to accrue owed rent from the tenant. Parties may, however, contractually agree that the landlord has a right to claim post-eviction rent.⁵ Importantly, the landlord should review the terms of the lease and determine a strategy on the front end by thinking through all his available options before sending a termination letter.

III. WHAT CONSTITUTES RESIDENTIAL ABANDONMENT

Generally, when a tenant vacates the premises prior to the end of the lease term, the tenant has abandoned the tenancy.⁶ Once the property is abandoned, the landlord may either: 1) accept the tenant's surrender and terminate the lease; 2) obtain another tenant and hold the original tenant liable for any deficiency that may occur; or 3) allow the premises to remain vacant while collecting the agreed-upon rent from the original tenant.⁷

The tenant's surrender of the property has no legal effect until the landlord accepts the surrender.⁸ The landlord's acceptance of the surrender effectively terminates the lease.⁹ The landlord's possession of the abandoned premises will not constitute acceptance of the surrender.¹⁰ If, however, the tenant abandons the premises and the

⁴ See *Inter'l Biochemical Indus. Inc. v. Jamestown Mgmt. Corp.*, 262 Ga. App. 770, 773 (2003); *Peterson v. P.C. Towers, L.P.*, 206 Ga. App. 591(2), (1992).

⁵ See *Inter'l Biochemical Indus. Inc. v. Jamestown Mgmt. Corp.*, 262 Ga. App. 770, 773 (2003); *Peterson v. P.C. Towers, L.P.*, 206 Ga. App. 591(2), (1992).

⁶ *Erfani v. Bishop*, 251 Ga. App. 20 (2001); *White v. Orton Indus.*, 224 Ga. App. 342, 343-344 (1997).

⁷ *Lawson v. Crawford*, 220 Ga. App. 447 (1996).

⁸ *Id.*; *Kimber v. Towne Hills Dev. Co.*, 156 Ga. App. 401, 402 (1980).

⁹ *Id.*

¹⁰ *Lawson*, 220 Ga. App. at 447..

landlord changes the locks, this gives rise to an inference that the landlord is accepting the surrender of the premises.¹¹ Whether the lease is terminated affects both the landlord's and tenant's future rights.

For example, in *Erfani v. Bishop*, the tenant vacated the premises prior to the lease's expiration.¹² Although the tenant had paid rent through the end of the month, the landlord claimed a deficiency because the tenant owed an additional month's rent for failing to give proper notice and because the tenant was behind in the utility payments.¹³ After the tenant moved out, the landlord changed the locks. Later, the tenant returned, and forced the door open to enter the premises and get the rest of his property.¹⁴ Because the tenant had abandoned the premises and the landlord accepted the surrender by installing new locks, the court held the tenant was a trespasser.¹⁵

Whether the landlord accepts the tenant's surrender impact the landlord's options with respect to future rent payments. For example, if the tenant abandons the property, the landlord may choose not to accept the tenant's surrender, allow the premises to remain vacant, and hold the tenant responsible for the accruing rent.¹⁶ Under this scenario, Georgia law does not require a landlord to mitigate its damages by re-letting the space.¹⁷ Additionally, the landlord is not required to notify the tenant that he is refusing to accept the tenant's surrender of the premises.¹⁸ If, the landlord accepts the tenant's

¹¹ *Erfani*, 251 Ga. App. at 22.

¹² 251 Ga. App. at 22.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 23.

¹⁶ *Allen v. Harkness Stone Company*, 271 Ga. App. 397, 400 (2005); *see also Shaheen & Co. v. Dickson*, 207 Ga. App. 328, 329 (1993).

¹⁷ *Allen v. Harkness Stone Company*, 271 Ga. App. 397, 400 (2005).

¹⁸ *Swim Dixie Pool Corp. v. Kraemer*, 157 Ga. App. 748 (1981).

surrender of the premises, however, this rule does not apply and the landlord must make reasonable efforts to re-lease the premises.¹⁹

IV. HOLDOVERS COMPARED – WHAT YOU NEED TO KNOW

A tenant may also be evicted for holding over. Generally, when a lease expires without a renewal provision, the tenant must vacate the premises. If the tenant does not vacate on time, the tenant becomes a tenant at sufferance. Under Georgia law, a tenant at sufferance enters a premise lawfully and holds over wrongfully without the landlord's assent or dissent.²⁰ "A tenant at sufferance holds over by wrong, and he is in possession not by permission of the landlord, but as a result of his laches or neglect."²¹ A tenant at will, however, is someone who holds the premises by the landlord's permission.²² If the landlord indicates his permission for the tenant to remain in the premises, the tenancy at sufferance will be converted into one at will.²³

This distinction becomes important because of the different notice requirements for terminating a lease under Georgia law. If the tenant is at sufferance, notice to quit is not necessary to terminate the tenancy and file a dispossessory proceeding.²⁴ When the tenant is a tenant at will, however, the landlord must give sixty (60) days notice to the tenant before terminating the lease.²⁵ When a tenant is one of sufferance, it is very important that the landlord avoid creating a tenancy at will by doing something to indicate his permission for the tenant to remain in possession of the property. Accepting rent, for example, would change a tenancy at sufferance to one at will.

¹⁹ *Id.*; see also *Ga. Color Farms v. K.K.L., L.P.*, 234 Ga. App. 849 n. 1 (1998).

²⁰ *Carruth v. Curruth*, 77 Ga. App. 131, 134 (1948); *Fallin v. Rule*, 197 Ga. App. 865 (1990).

²¹ *Id.* at 135 (citing *Willis v. Harrell*, 118 Ga. 906, 909).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 134.

²⁵ O.C.G.A. § 44-7-77. Similarly, a tenant must give thirty (30) days notice to the landlord to terminate a tenancy at will. O.C.G.A. § 44-7-77.

Many leases contain a provision stating that in the event the tenant remains in possession of the premises after the expiration of the lease term and without executing a new lease, the tenant holding over “shall be construed as a tenancy from month to month.” Georgia courts have held that a landlord and tenant who continue to act as if a lease is in place after a lease expires extend the lease by the lease term (i.e. enter into a new lease for one year). It is also possible that the tenant could argue that this language creates a tenancy at will because the landlord is implicitly stating in the lease that the tenant may remain in possession of the premises after the lease expires.

V. WHEN LANDLORDS CAN BE SUBJECT TO FORCIBLE ENTRY CHARGES

When the entire premises are leased, unless the parties have an agreement to the contrary, the landlord has no right to enter the premises unless he has the tenant’s permission.²⁶ “An unauthorized intrusion of the landlord on the leased premises constitutes a trespass even as against the tenant to the same extent as an entry or intrusion by a stranger.”²⁷

A landlord also subjects himself to potential liability if he attempts to illegally evict the tenant. Georgia has adopted the modern doctrine that requires a landlord who is otherwise entitled to possession of space that the tenant refuses to surrender to resort to the remedy provided by law to secure the premises rather than attempt self help.²⁸ “A landlord may not forcibly dispossess a tenant without subjecting himself to an action for trespass even if the tenant is holding over beyond his term, is in arrears in his rent, and

²⁶ *Livaditis v. American Cas. Co.*, 117 Ga. App. 297, 301 (1968).

²⁷ *University Apartments v. Uhler*, 84 Ga. App. 720 (1951); *Ranwez v. Roberts*, 268 Ga. App. 80 (2004).

²⁸ *Roberts v. Roberts*, 205 Ga. App. 371, 372 (1992)(citing *Teston v. Teston*, 135 Ga. App. 321 (1975)).

has received legal notice to vacate.”²⁹ A landlord who trespasses upon a tenant’s property may be liable for actual damages and punitive damages.³⁰

In *Entelman v. Hagood*, the Georgia Supreme Court heard an action for trespass by a tenant against her landlord for forcibly ejecting her and removing her goods from a leased premises.³¹ The lower court found against the plaintiff/tenant’s right to recover. On appeal, the reviewing court granted a new trial, saying that forcible entry and detainer statute abrogated the landlord’s common-law right to retake possession by force.³² The court reasoned that the law gave the landlord ample redress and a summary process to retain possession of his property.³³ Therefore, a landlord who resorts to force renders him chargeable with trespass.

Georgia courts have also granted relief to tenants whose landlord denied them access to all of the leased property.³⁴ A landlord cannot deny a tenant access to the premises he or she has leased. In *Davis v. Blum’s Inc.*, the Georgia Supreme Court granted injunctive relief against a landlord, who, during the term of a lease erected a fence around the boundary of the rented premises that denied the tenant restaurant access to an adjacent property he had rented as parking for the restaurant.³⁵ The court found, “[w]here premises are leased exclusively, it is a continuing trespass for the lessor to erect and maintain a...wall over them without the lessee’s consent and contrary to his wishes; and equity will enjoin such a trespass.”³⁶

²⁹ *Swift Loan & Fin Co., Inc. v. Duncan*, 195 Ga. App. 556, 557 (1990).

³⁰ *Swift Loan & Fin Co., Inc. v. Duncan*, 195 Ga. App. 556, 557 (1990).

³¹ 95 Ga. 390 (1894).

³² *Id.*

³³ *Id.*

³⁴ *Davis v. Blum’s Inc.*, 223 Ga. 790 (1967).

³⁵ 223 Ga. 790 (1967).

³⁶ *Id.* (internal citations omitted).

VI HOW TO TREAT UNCLAIMED TENANT PROPERTY

How a landlord treats the property the tenant left behind depends on what type of property it is. Georgia law provides that “[a]fter the term and [the tenant’s] possession are ended, any trade fixtures remaining will be regarded as abandoned for the use of the landlord and will become the landlord’s property.”³⁷ The tenant must remove all his fixtures before he quits possession or the lease terminates. Otherwise, the tenant is understood as dedicating the property to the landlord.³⁸ Trade fixtures are defined as items annexed to the realty by the tenant for the purpose of carrying on his trade.³⁹ A structure built by a tenant for the purpose of carrying on his business can be considered a trade fixture.⁴⁰

A landlord should not, however, necessarily consider personalty left by a tenant on the premises after the term of the lease expired abandoned.⁴¹ Georgia courts require more than the mere fact that the property has been left on the premises to find abandonment.⁴² In *Cozart v. Johnson*, the Georgia Supreme Court considered where a safe left on a premise after a tenant bank vacated could be considered abandoned by the landlord.⁴³ The court found that since the safe “was not attached to the building and was moveable at pleasure upon its rollers, with no injury to any part of the building, it may have been a mere chattel, incapable as a matter of law of becoming a trade fixture” as mere personalty, the safe was not the possession of the landlord and could not be considered abandoned either.⁴⁴ However, if the terms of the lease state that a tenant's personalty will be deemed "abandoned" and become property of landlord if left on

³⁷ O.C.G.A. § 44-7-12; *S.S. Air, Inc. v. City of Vidalia*, 278 Ga. App. 149, 151 (2006).

³⁸ *S.S. Air, Inc. v. City of Vidalia*, 278 Ga. App. 149, 151 (2006).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Kurc v. Herren*, 196 Ga. App. 331 (1990)(citing, *Cozart v. Johnson*, 181 Ga. 337 (1935).

⁴² *Id.*

⁴³ 181 Ga. 337 (1935).

⁴⁴ *Id.* at 505.

premises after termination of lease, then that is enforceable and the landlord may take possession of the “abandoned” property.⁴⁵

VII CONCLUSION

If the tenant abandons your premises, you have many different options to consider. Make sure you think through your strategy to determine all your available remedies and determine a plan that will meet your objectives.

⁴⁵ *Kurc v. Herren*, 196 Ga. App. 331 (1990).