COMMERCIAL LEASE AND LANDLORD/TENANT ENFORCEMENT AND DISPUTES

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Commercial landlord-tenant relationships bring their own unique circumstances. While certain aspects of the relationship are governed by statute, commercial landlords and tenants have the ability to circumvent these statutory protections through contract. Therefore, in the commercial landlord-tenant relationship, the lease is the most important document when a dispute arises. This article will examine common disputes that arise in the context of a commercial landlord-tenant relationship.

A. Rights, Remedies and Defenses

1. CAM Fee Disputes

Commercial leases are typically "net" leases, which means that the landlord is entitled to the base rental as its economic return. Under a net lease, the tenant is typically required to pay for property taxes, insurance and property operation expenses, known as "common area maintenance" or "CAM" charges. The lease typically defines the components of the CAM charge, which is paid in addition to base rent. CAM is typically reimbursed monthly, on an estimated basis, with a "true-up" after the end of the year. CAM charges are based on the percentage of the premises the tenant occupies, so if, for example, a tenant occupies 28% of a retail shopping center, that tenant's CAM charges will be 28% of the total CAM charge for the entire center.

CAM fee disputes often arise because a tenant's CAM fee is determined by the landlord based on the landlord's accounting. Therefore, when a tenant disagrees with the amount of CAM being charged by the landlord, the tenant must evaluate what options it has to challenge the CAM charge. Sometimes a lease will give the tenant the

right to audit the landlord's books and records in the event of a CAM dispute. In the absence of such a provision, a tenant is left to implore a court to allow it to inspect such records through the implied duty of good faith and fair dealing found in every contract.

The implied duty of good faith and fair dealing imposes a duty upon the parties to cooperate with each other so that each may obtain the full benefit of performance under the contract. This covenant allows a court to imply terms in a contract that are necessary to effectuate the contract's express terms. Practically speaking, this means that courts will infer a general right by the tenant to verify the accuracy of CAM charges. However, there is less of a consensus over whether a right to conduct an audit can be implied in a lease agreement that otherwise lacks an audit provision. The Georgia appellate courts have not yet addressed this issue to provide guidance as to whether a Georgia tenant can force such an inspection.

2. Repair/Maintenance

From a tenant's perspective, the landlord's obligation to repair and maintain the premises is the lease's most important requirement. Georgia law places the obligation to repair and maintain the leased premises clearly with the landlord.[1] Georgia law also holds the landlord liable for damages incurred by either the tenant or third parties resulting from the landlord's breach of his duty to keep the premises in good repair.[2] In commercial leases, however, a landlord may transfer the repair obligation to the tenant by express provision in the lease.[3]

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[1] O.C.G.A. § 44-7-13; Lewis & Co. v. Chisholm, 68 Ga. 40 (1881).
[2] O.C.G.A. § 44-7-14.
[3] Gaffney v. EQK Realty Investors, 213 Ga. App. 653 (1994).

If the lease is silent on this issue, O.C.G.A. § 44-17-13 governs the landlord's obligation to repair the premises.[4] This is especially important in commercial leases where the landlord and tenant contract to be responsible for different the maintenance and repair of different aspects of the property. For example, the lease may provide that the landlord is responsible for maintaining the roof, exterior walls, and foundation; while the tenant may be responsible for maintaining the interior walls and flooring, HVAC system and plumbing. If the lease is silent as to which party is responsible for maintaining the electrical system, under Georgia law, that duty falls to the landlord.[5] The best way to avoid this issue is to expressly state which aspects of the property one party will be responsible for repairing, and then state that the other party is responsible for everything else. The lease should also specify which party is responsible for performing routine maintenance and repairs required by governmental codes.

Of course, a landlord cannot fix what it does not know is broken. Since most leases given the tenant exclusive possession of the premises, most leases also include a requirement that the tenant notify the landlord of needed repairs as a prerequisite to holding the landlord liable for breach of his duty to repair. Under Georgia law, unless the lease says otherwise, oral notice is sufficient.[6] For this reason, it is important to include a written notice requirement in the lease. Even if the lease requires written notice, a landlord may waive this requirement by his conduct in acting upon oral notice.[7]

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[4] Sewell v. Royal, 147 Ga. app. 88 (1978).
[5] See Midtown Chain Hotels Co. v. Bender, 77 Ga. App. 723 (1948).
[6] Overstreet v. Rhodes, 93 Ga. App. 422 (1956), *rev'd on other grounds* 212 Ga. 521 (1956).
[7] In re Max Specialists, Inc. v. Nat'l Life Ins. Co., 207 Ga. App. 624 (1993).

If a landlord fails to make repairs after being on notice, a tenant has three options to enforce the landlord's obligations: (1) the tenant may perform the repairs himself and seek reimbursement from the landlord; (2) the tenant may file suit against the landlord for damages; or (3) if the landlord sues the tenant for non-payment of rent, the tenant may file a counterclaim for recoupment. The tenant does not, however, have the right to withhold rent payments for the landlord's failure to repair the premises. This is because the tenant's obligation to pay rent and the landlord's obligation to repair the premises are separate and distinct covenants.[8]

If the landlord's failure to repair the premises rises to such a level that the tenant can no longer utilize the premises for the reason it was leased, the tenant may abandon the premises and cease paying rent based on the defense of constructive eviction.[9] It is not sufficient that the landlord's failure to repair results in a mere inconvenience to the tenant – the landlord's failure must result in the *untenantability* of the property.[10] In order to find a constructive eviction has occurred, there are several essential elements: (a) the landlord's failure to repair the premises has allowed the premises to deteriorate to the extent that the premises is unfit for the tenant to carry on the business for which the premises was rented; (b) the landlord could not restore the premises to a fit condition by ordinary repairs which could be made without reasonable interruption to the tenant's business; and (c) the tenant has actually vacated the premises.[11]

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[8] Lewis & Co. v. Chisholm, 68 Ga. 40 (1881); see also Williams v. Housing Auth., 158 Ga. App. 734 (1981); Hardwick, Cook & Co. v. 3379 Peachtree Ltd., 184 Ga. App. 822 (1987).
[9] Lewis & Co. v. Chisholm, 68 Ga. 40 (1881).
[10] SunAmerica Fin. v. 260 Peachtree St., 202 Ga. App. 790 (1992).
[11] Thrisk v. Coldwell Banker/Barton & Ludwig Realtors, 172 Ga. App. 236 (1984); see Snipes v. Halpern Enterprises, Inc., 160 Ga. App. 207 (1981) (barring a constructive eviction claim when the tenant accepts the premises "as is" because the condition complained of existed at the time of executing the lease).

3. Lease Extension

Disputes over lease extensions arise most often as a result of poorly drafted lease language that insufficiently specifies the terms of the extension. Georgia's appellate courts distinguish between a lease "extension" and a lease "renewal." A lease "extension" merely lengthens the time upon terms and conditions stated in the lease without the requirement of a new agreement.[12] A "renewal" contemplates the execution of a new contract due to the determination of a new rental rate.[13]

In McCormick v. Brockett,[14] the Georgia Court of Appeals described what is necessary for a provision in a lease providing for a renewal must contain to be enforceable:

> A provision for the renewal of a lease must specify the terms and conditions of the renewal with such definite terms and certainty that the court may determine what has been agreed on, and if it falls short of this requirement it is not enforceable. It must be certain and definite both as to the time the lease is to extend and the rent to be paid. A provision for renewal need not presently fix all of the terms of the new lease; it may furnish a certain and definite method for their ascertainment and determination in the future. On the other hand, if terms, such as duration and rent, are left for future ascertainment, and no method is provided by which they are to be determined, the contract is unenforceable for uncertainty.[15]

For example, the court in Smith v. Huckeba,[16] concluded that a renewal provision stating that "the rental rate shall be the fair market rental value" of the property was unenforceable even though "fair market rental value" is not entirely ambiguous.[17] Similarly, in Essex, the lease language did not provide an objective method of

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[12] Powell v. Norman Elec. Galaxy, 229 Ga. App. 99 (1997).
[13] Chalkley v. Ward, 119 Ga. App. 227, 229 (1969); see also Insurance Industry Consultants, Inc. v. Essex Inv., Inc., 249 Ga. App. 837 (2001).
[14] 167 Ga. App. 325 (1983).
[15] Id. at 325-26.
[16] 232 Ga. App. 374, 376 (1998).
[17] Id.

ascertaining the fair market rental rate, did not define key terms like "comparable properties," "comparable premises," or "Northwest office submarket." Moreover, the lease did not specify the person or agency charged with selecting the key factors and ultimately determining the fair market rental rate. In both cases, the court concluded that the renewal provision was too ambiguous to be enforceable. In both Smith and Essex, the court concluded that the renewal provisions were not sufficiently definite or certain and were unenforceable.

B. Tenant Default: Rights, Remedies and Defenses

The vast majority of tenant defaults stem from the tenant's failure to pay rent. Upon said failure, a landlord has three basic avenues of recourse: (1) dispossession; (2) distraint; and (3) a suit for rent.[18] A landlord may pursue a suit for rent simultaneously with either a dispossessory or distraint proceeding. In commercial leases, the procedural provisions in the dispossessory and distress statutes may be contractually circumvented.

1. Termination v. Dispossession Proceedings

a. Lease Termination

Lease terms are almost always determined by the contractual language in the lease agreed to by the landlord and tenant. Most leases, however, describe a special set of events that give rise to the landlord's right to terminate the lease prior to the end of the contractually agreed upon lease term. These events usually include the tenant's failure to pay rent, violation of an express prohibition of the lease, and the like. When a landlord desires to terminate a lease prior to the expiration of the lease term, the lease typically requires the landlord to provide the tenant with notice prior to the termination.

[18] See O.C.G.A. §§ 44-7-50; 44-7-70.

If a lease expires by its terms, however, Georgia law provides that the lease is automatically terminated without the necessity of notice.[19]

If a tenant defaults prior to the expiration of the term, the landlord must timely serve the tenant with a notice of default, a notice of termination, and finally a demand for possession as part of the landlord's effort to dispossess the tenant from the property. For example, in Wig Fashions, Inc. v. A-T-O Properties,[20] the landlord sent the defaulting tenant four notices of default, threatening that the tenant's failure to cure the default in ten days "would result in termination." The Court of Appeals held that the landlord's subsequent dispossessory was unlawful because the letters did not terminate the lease, and at most could only be read to evidence the landlord's intent that the lease be terminated at the end of the ten day period. Therefore, the subsequent demand for possession was premature and ineffective.

A tenant may also desire to terminate a lease prior to the end of the lease term, and often times a landlord will allow such a surrender of the premises. In Lamb v. Gorman,[21] the Georgia Court of Appeals stated:

> [t]o complete the evidence of surrender, there must be evidence of something more than an inability on the part of the landlord to compel the tenant to remain in possession. There must be either possession on the part of the tenant, or such circumstances as compel the conclusion that the landlord consented to retake possession of his property.[22]

Thus, documenting the surrender of possession of a leased premises is of paramount importance for a tenant.

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[19] O.C.G.A. § 44-7-10.
[20] 145 Ga. App. 325 (1978).
[21] 16 Ga. App. 663 (1915).
[22] Id.

b. Dispossessory Proceedings

If a tenant does not voluntarily surrender possession of a leased premises either at the conclusion of the lease term or upon landlord's demand, the landlord will be forced to resort to Georgia's statutory dispossessory process. A landlord must demand possession of the premises prior to commencing a dispossessory proceeding.[23] Demand may be written or oral, and, while there is no certain form, the demand must be "unequivocal, unconditional, and so certain that the tenant cannot reasonably misunderstand it." F.W. Woolworth v. Buford-Clairmont Co.,[24] The demand must clearly state the reasons for the action.[25] For example, if the landlord seeks to evict the tenant because the tenant failed to pay rent when due, that reason should be expressly stated in the demand for possession.

After the landlord has demand possession of the premises, but the tenant has failed or refused to surrender possession, the landlord may then proceed to institute a dispossessory proceeding under O.C.G.A. § 44-7-50, et seq. Georgia law provides three independent grounds for dispossession: (1) the tenant is holding over beyond the term of the lease; (2) the tenant failed to pay rent when due; or (3) the landlord desires possession of the premises held by a tenant at will or a tenant at sufferance. To initiate the dispossessory action, the landlord, his agent or attorney must make a sworn affidavit under oath of the facts giving rise to the landlord's right to dispossess the tenant.[26] If there are multiple grounds for dispossession, each ground must be stated separately and

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[23] O.C.G.A. § 44-7-50.
[24] 769 F.2d 1548, 1553 (11th Cir. 1985) (applying Georgia law); see also Sandifer v. Long Investors, Inc., 211 Ga. App. 757 (1994); Stephens v. Hous. Auth., 163 Ga. App. 97 (1982).
[25] Hous. Auth. of Dekalb v. Pyrtle, 167 Ga. App. 181, 183 (1983).
[26] O.C.G.A. § 44-7-50(a).

positively. Further, the affidavit should not use "and/or" language as such language has been found to be too ambiguous to be effective.[27]

After the landlord makes the affidavit, the court issues a summons commanding the tenant to answer within seven days from the date of the actual service, unless that date falls on a weekend or legal holiday.[28] Typically, each court has it own form affidavit and summons. The sheriff or other qualified individual must serve the affidavit and summons on the tenant, any person sui juris, or by "tack and mail" service.[29] In commercial real estate cases, "tack and mail" is only permissible when doing so is "reasonably calculated, under the circumstances, to afford notice."[30] A careful attorney representing a landlord should also beware that "tack and mail" service only confers quasi-in-rem jurisdiction on the tenant, and if the tenant fails to answer, the court cannot render a judgment against the tenant for rent due.[31] If the tenant fails to answer in the seven-day period, the landlord is entitled to a default judgment and writ of possession.[32] If the tenant files an answer, the matter proceeds to trial.

c. Eviction Proceedings and Wrongful Eviction Remedies

After the Court enters a writ of possession, the landlord must wait seven (7) days (or longer if ordered by the Court) before evicting the tenant.[33] Then, the landlord may work with the local sheriff's office to schedule the eviction. The landlord is responsible for the cost of the eviction. The sheriff will post a 24-hours notice to the tenant. If the tenant does not leave, the sheriff will appear with the landlord to supervise the tenant's

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[27] Taylor v. Carver State Bank, 177 Ga. App. 856 (1986) (abrogated on other grounds).
[28] O.C.G.A. § 44-7-51(b).
[29] O.C.G.A. § 44-7-51(a).
[30] Davis v. Hybrid Indust., Inc., 142 Ga. App. 722 (1977).
[31] Hous. Auth. v. Hudson, 250 Ga. 109 (1982).
[32] O.C.G.A. § 44-7-53(a).
[33] O.C.G.A. § 44-7-55(a).

eviction. The landlord is responsible for removing the tenant's personal belongings and placing them on landlord's land outside of the rented space.[34] Once the tenant's belongings are removed, the landlord has no further legal obligation to keep or protect them and they are considered to be abandoned.

While commercial leases typically allow the landlord to engage in "self-help" evictions, this procedure is not recommended. Georgia courts have held that if a landlord evicts a tenant without first filing a dispossessory action and obtaining a writ of possession, or without following the dispossessory procedures for handling the tenant's personal property, the landlord can be held liable for wrongful eviction and trespass.[35] A valid writ of possession helps to protect the landlord from this liability in the event the tenant has a viable defense to the dispossession.

In following O.C.G.A. § 44-7-55(c), a landlord should be careful to place the tenant's personal property removed from the premises on some portion of the property owned by the landlord, or some other location as approved by the sheriff (such as a sidewalk). Otherwise, a court could find that the personal property is not deemed abandoned and that the landlord is liable to the tenant for conversion. For example, In Higgins v. Benny's Venture, Inc.,[36] the property in question was "left in place" when the writ was executed with instruction to the landlord by the sheriff to allow the tenant to later remove the property.[37] In this instance, the Georgia Court of Appeals held that the property was "not place don some portion of the landlord's property as required by the

[34] O.C.G.A. § 44-7-55(c).
[35] Ikomoni v. Executive Asset Mgmt., LLC, 309 Ga. App. 81, 84 (2011).
[36] 309 Ga. App. 102 (2011).
[37] Id. at 104.

statute, and it was therefore not abandoned."[38] Similarly, in Washington v. Harris,[39] the Georgia Court of Appeals held that a landlord who had obtained a writ of possession could be liable for conversion because, instead of placing the tenant's property on some portion of the land, the landlord "hired a salvage crew to simply remove [the tenant's] personal property . . . with no consideration given as to its ultimate fate."[40] Thus, the tenant's property was not deemed abandoned.[41]

If the writ is overturned on appeal but the landlord has nonetheless carried out the eviction, the landlord will not be liable for wrongful eviction.[42] "A landlord who obtains a writ of possession and follows all of the legal requirements for executing that writ may not be held liable in tort for those lawful actions on the *sole basis* that the writ is later vacated."[43]

2. Distress Proceedings

"Distraint" is a right the landlord has to cause the tenant's property to be seized to satisfy the tenant's rental obligations. Georgia law gives a landlord a general lien on his tenant's leviable property.[44] The method of enforcing this lien is known as a distress proceeding, and is governed by O.C.G.A. § 44-7-70, *et seq.* In Georgia, distrain is a seldom-utilized statutory procedure. The statute requires that the tenant be provided with notice and the opportunity for a hearing prior to seizure of his property, which

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[38] Id.
[39] 299 Ga. App. 335 (2009).
[40] Id. at 339.
[41] Id.
[42] See Stringer v. Bugg, 254 Ga. App. 745, 747 (2002); see also Smith v. Republic Realty Serv., Inc., 216 Ga. App. 736, 736 (1995).
[43] Fennelly v. Lyons, 333 Ga. App. 96, 105 (2015).
[44] O.C.G.A. § 44-14-341.

effectively gives the tenant an opportunity to conceal or remove his property from the leased premises out of the landlord's reach.

3. Collection of Rent Disputes

A landlord may assert an action against a tenant for past-due rent as a stand alone action, or in conjunction with a dispossessory proceeding.[45] If the latter, the same procedures for dispossessory proceedings discussed in Section B.1., above, must be followed.

Generally, when a landlord evicts a tenant and takes possession of the premises, the lease is terminated and the right to claim rent which accrues after the eviction is extinguished.[46] However, parties to a lease agreement may contract in advance to hold the tenant liable for rent accruing after an eviction, deducting therefrom only the amounts recovered by the landlord for reletting the premises. Such a provision must be explicit and detailed, and must clearly and unequivocally demonstrate the parties' intention to hold the tenant liable for rent that accrues after an eviction.[47]

Some commercial leases also contain a rent acceleration provision. A landlord may only accelerate rent for the balance of the lease term if the lease contains such an acceleration clause.[48] Georgia courts view these rent acceleration clauses as liquidated damages provisions.[49] To be enforceable, an accelerated rent provision must therefore meet the three-part test for liquidated damages set forth in Southeastern Land Fund, Inc. v. Real Estate World, Inc.,[50] (1) the injury caused by the breach must be difficult or

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[45] O.C.G.A. § 44-7-55(a).
[46] Peterson v. P.C. Towers, L.P., 206 Ga. App. 591 (1992).
[47] Id.
[48] Kasum Communications, Inc. v. CPI N. Druid Co., 135 Ga. App. 314 (1975).
[49] Peterson, 206 Ga. App. 591.
[50] 237 Ga. 227 (1976).

impossible of accurate estimation; (2) the parties must intend to provide for damages rather than for a penalty; and (3) the sum stipulated must be a reasonable pre-estimate of the probable loss.[51] Rent acceleration clauses that allow the landlord to collect the entire future rent without reducing the sum to present value or without deducting the present value of the future rental value of the premises during the remaining lease term are likely unenforceable.

If a landlord evicts a tenant or terminates the lease, the landlord's right to future rent is extinguished absent a lease provision to the contrary.[52] Georgia courts have endorsed two types of lease provisions that permit the recovery of future rents when the landlord evicts the tenant. In Hardin v. Macon Mall,[53] the court approved of a lease provision that permitted the landlord to recover each month the deficiency between (i) the amount of rent due that month; and (ii) the amount of rent the landlord collected that month. In Mullis v. Shaheen,[54] the court approved of a lease provision that permitted the landlord to accelerate "the worth at the time of termination of the difference between the rent under the lease and that for which the premises was relet, if any, for the remainder of the lease."[55]

When the tenant abandons the premises, the landlord may accept the abandonment and sue at once for "the excess of the rent reserved under the lease agreement over the reasonable rental value of the premises at the time of the breach."[56] The landlord may also elect not to accept the abandonment and to treat the lease as

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[51] Id.
[52] Mullis v. Shaheen, 217 Ga. App. 277 (1995).
[53] 169 Ga. App. 793 (1984).
[54] 217 Ga. App. 277 (1995).
[55] Id.
[56] Piggly Wiggly S., Inc. v. Eastgate Assoc., Inc., 195 Ga. App. 19 (1990).

remaining in full force and effect, in which even the landlord may permit the premises to remain vacant while collecting the agreed upon rent from the original tenant, or obtain another tenant while holding the original tenant liable for any deficiency that may occur.[57]

How, then, should a landlord recover rent that accrues subsequent to filing suit? In a statutory eviction proceeding, a landlord is entitled to all rent that is due.[58] In a civil action to recover rents, "each installment under a [lease] contract constitutes a different cause of action on which an action can be brought, even though all are provided in the same contract."[59] "In order to recover rents that become due after commencement of an action seeking rents that are already past due, a plaintiff must amend his original complaint under O.C.G.A. § 9-11-15(a), supplement his pleadings under O.C.G.A. § 9-11-15(d), or try the additional issues with the express or implied consent of the other party in accordance with O.C.G.A. § 9-11-15(b)."[60] Alternatively, once the landlord establishes liability judicially, the landlord should be entitled to initiate successive suits in the future to obtain the actual amount of damages suffered on account of the prior default.

A landlord may also recover amounts in addition to past due rent, including interest, default interest, late fees, and attorney's fees. Most lease agreements provide that unpaid rent is subject to interest at some agreed upon rate, subject to usury restrictions. Georgia's usury restrictions provide that if the late rent installment is

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[57] Crolley v. Crow-Childress-Mobley #2, 190 Ga. App. 496 (1989); Love v. McDevitt, 114 Ga. app. 734 (1966).
[58] O.C.G.A. § 44-7-50(a).
[59] Dwyer v. Anand, 210 Ga. App. 419 (1993).
[60] Id.

$3,000 or less, the interest rate shall not exceed 16% per annum simple interest.[61] There are no civil usury limitations on sums in excess of $3,000 per month, but criminal usury provisions limit interest to 5% per month.[62] Generally, sums owed under contracts that do not specify an interest rate will bear interest at 7% per annum from the due date.[63]

Georgia law permits a landlord to assess a late charge against a tenant for failing to pay any sum in a timely manner so long as such late charge satisfies the three-part Southeastern Land Fund test for liquidated damages. Courts look at late charges as reasonable pre-estimates of additional administrative, bookkeeping and clerical expenses resulting from the tenant's late payment.[64]

Where a lease does not contain an obligation for the tenant to pay landlord's attorney's fees in pursuit of collections, the landlord typically cannot recover fees.[65] However, a landlord may seek fees where the defendant tenant has "acted in bad faith, been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."[66]

Where a lease does contain an obligation for the tenant to pay the landlord's attorney's fees in pursuit of collections, O.C.G.A. § 13-1-11 provides the procedures for

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[61] O.C.G.A. § 7-4-2(a)(2).
[62] O.C.G.A. § 7-4-18(a).
[63] O.C.G.A. § 44-7-16 (all unpaid rent shall bear interest); O.C.G.A. § 7-4-2(a) (setting the legal rate of interest).
[64] Oami v. Delk Interchange, Ltd., 194 Ga. App. 640 (1989); Krupp Realty Co. v. Joel, 168 Ga. App. 480 (1983).
[65] See O.C.G.A. § 13-6-11 ("the expenses of litigation generally shall not be allowed as part of the damages").
[66] Id.

recovery.[67] For collection of attorney's fees, the statute requires that the lease must include an obligation to pay attorney's fees; the debt (i.e., rent obligation) must have matured; written notice must be given to the debtor informing him that he has ten days from receipt of the notice to pay the debt in order to avoid attorney's fees; the ten-day period must expire without payment of the debt (and any interest thereon) in full; and the debt must be collected through an attorney at law.[68]

If the landlord complies with O.C.G.A. § 13-1-11 and the lease provides that the tenant will pay attorney's fees equal to a specified percentage of the amount owed, the percentage may not exceed 15%.[69] If the landlord complies with O.C.G.A. § 13-1-11 and the lease provides that the tenant will pay "reasonable attorney's fees" without specifying a percentage, the landlord is entitled to collect 15% of the first $500 owed, and 10% of any sums over $500.[70] Prevailing party attorney's fees provisions are also allowed in Georgia.[71]

C. Jury Trial Waiver and Venue Provisions

1. Jury Trial Waiver

While most leases contain boilerplate language regarding a waiver of the right to a jury trial, the Georgia Supreme Court has held that pre-litigation contractual waivers of the right to trial by jury are unenforceable in cases tried under Georgia law.[72] Consequently, most, if not all, standard jury waivers in form leases and guaranty

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[67] See Georgia Color Farms, Inc. v. KKL Ltd. P'ship, 234 Ga. App. 849 (1998) (a lease is "evidence of indebtedness" under O.C.G.A. § 13-1-11 and falls within the ambit of the statute).
[68] O.C.G.A. § 13-1-11(a)(3).
[69] O.C.G.A. § 13-1-11(a)(1).
[70] O.C.G.A. § 13-1-11(a)(2).
[71] Georgia Color Farms, 234 Ga. App. 849.
[72] Bank South, N.A. v. Howard, 264 Ga. 339 (1994).

agreements are unenforceable as a matter of law. While most leases contain a severability provision addressing scenarios where particular concepts are deemed unenforceable, a prudent practitioner should not allow such language to make it into a lease, much less attempt to enforce it in court. At a minimum, the lease should qualify the jury trial waiver as only being valid "to the extent permitted by applicable law."

2. Venue Provisions

Under O.C.G.A. § 14-2-510(b)(2), venue in contract actions is proper "in that county in this state where the contract to be enforced was made or is to be performed, if the corporation has an office and transacts business in that county." Accordingly, in most commercial lease scenarios, a landlord's suit against a tenant under the lease for unpaid rent is proper in the county where the premises is located.

This reality is also driven by the dispossessory statute's requirement that a suit for dispossession should be brought in the county where the property is located.[73] This is not so much a venue rule as one of jurisdiction, as a court in a county other than where the property is located does not have subject matter jurisdiction to hear a dispossessory action.

D. Notable Recent Cases

Anglin v. Moore,[74] is an example of Georgia law's disfavor of a landlord's self-help eviction remedies. In Anglin, after the tenants were late on their rent, the landlord cut off water to the rented premises, changed the locks, and went through the tenants' personal property. After engaging in these self-help remedies, the landlord filed a dispossessory action in magistrate court. The tenants answered and counterclaimed for

[73] O.C.G.A. § 44-7-50.
[74] 332 Ga. App. 346 (2015).

a breach of the lease, wrongful constructive eviction, trespass, and other claims. The magistrate awarded the tenants approximately $30,000 (including $10,000 in punitive damages) and ordered the landlord to allow the tenants to enter the premises to retrieve their personal items. The landlord appealed to the superior court and, after a bench trial, was ordered to pay the tenants $43,000 (including over $30,000 in attorney's fees). The Court of Appeals affirmed the superior court's award.

In Fennelly v. Lyons,[75] the magistrate court issued a writ of possession. During the eviction, the landlord removed the tenant's items from the leased premises, and the sheriff advised that if the tenant did not claim the items within twenty-four hours, the landlord could dispose of the items in any manner he saw fit. The landlord proceeded to dispose of the unclaimed items, and the tenant sued for wrongful eviction, trover and conversion. The Court of Appeals confirmed that if a landlord evicts a tenant without filing a dispossessory action and obtaining a writ of possession, or fails to follow proper procedures for handling the tenant's personal property, the landlord can be liable for wrongful eviction and trespass. Under O.C.G.A. § 44-7-55(c), however, because the landlord followed the statutory requirements, the tenant's personal property was properly deemed abandoned.

[75] 333 Ga. App. 96 (2015).