



Distrain – How a Georgia Landlord Can Obtain a Million Dollar Judgment and Perfect its Landlord’s Lien Against its Tenant’s Property in Just 5 Days

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During 2017, there was only one statutory distraint (distress warrant) proceeding (O.C.G.A. §§ 44-7-70 *et seq.*) filed by any landlord in Georgia’s most populous county – Fulton. The dearth of cases in which Georgia landlords have availed themselves of this powerful and useful legal remedy was not surprising to me personally. Many years ago when I successfully utilized this remedy against a significant tenant at Atlanta’s Phipps Plaza, quite a few attorneys expressed interest in that case and were eager to learn from my experience. So, it came as no surprise then that the distress warrant proceeding filed early this year by Knox Withers, one of my firm’s Litigation Group Partners with expertise in landlord-tenant cases, was assigned Case No. 18DW000001 (18 = year; DW = distress warrant; and 000001 = first DW case of the year).

By using the distraint proceeding remedy against Rosa Mexicano Restaurant at Atlanta’s Atlantic Station, my firm’s landlord client obtained a monetary judgment in the amount of \$1,296,254 and perfected its statutory landlord’s lien (O.C.G.A. § 44-14-341) against the property of the tenant remaining in the premises within a few weeks after it first learned that the tenant intended to vacate its premises. Under this lien statute, a Georgia landlord has “a general lien on the property of the debtor which is subject to levy and sale, which general lien shall date from the time of the levy of a distress warrant to enforce the general lien.” While the “debtor” referenced in this statute is, of course, a tenant, the appellate courts have broadly construed that word “debtor” in the context of the distraint remedy to include any tenant who has not paid all rent that may become due through the entirety of the lease term.

Specifically, the established law provides for two separate grounds upon which to initiate a distress warrant proceeding: (1) where rent is past due; or (2) where the tenant is removing its property from the premises. O.C.G.A. § 44-7-71; Cobb v. McCrary, 152 Ga. App. 212 (1979). In the latter situation, there does not have to be any past due rent for the landlord to seek a distress warrant. On the date the proceeding is filed, the landlord’s general statutory lien is perfected and takes precedence over other liens established subsequently. O.C.G.A. § 44-7-80. At the hearing in the proceeding, the landlord can also obtain a monetary judgment for all rent owed plus any other damages it has sustained. O.C.G.A. § 44-7-77; Powell v. Estate of Austin, 218 Ga. App. 446 (1995). Accordingly, this remedy has greater value where rent is owed and, in many instances, far greater value where the lease contains an enforceable acceleration provision.

To obtain the maximum money judgment possible in the Rosa Mexicano distress proceeding, the landlord responded to the tenant’s breach by accelerating the rent due for the remainder of the term of the restaurant lease prior to filing the affidavit to initiate the distraint proceeding. Had the landlord not done so, it would have been entitled to recover only rent due at the time the proceeding was filed. That result would have been dictated by the Georgia law that, “[w]here suit is brought on a written contract for rent payable in installments, a recovery cannot be had for installments falling due after the suit is commenced. Each installment under a contract constitutes a different cause of action on which an action can be brought . . .” Nickerson v. Candler Bldg., 156 Ga. App. 396 (1980); A. W. Williams v. Stancil, 119 Ga. App. 800 (1969). Fortunately, the acceleration provision in the Rosa Mexicano lease was well drafted and enforceable under the strict standard for enforceability under Georgia law.

Ordinarily, an acceleration clause must discount future rent to present value. Jones v. Clark,

147 Ga. App. 657 (1978). Accordingly, the rent in the Rosa Mexicano case was discounted at the rate specified in the parties' lease. In addition, all rent acceleration clauses must meet a tripartite standard for enforceability which provides that an acceleration provision is unenforceable as a penalty if: (1) the damages caused by the breach of lease are easily ascertained; (2) the provision readily resembles an unenforceable penalty; or (3) the acceleration amount is not a fair estimate of the landlord's probable loss. Southeastern Land Fund v. Real Estate World, 237 Ga. 227 (1976). Further, an acceleration provision that is "manifestly unreasonable and oppressive" will not be enforced, with the primary consideration being the number of years for which rent is being accelerated. Nobles v. Jiffy Market Food Store Corp., 260 Ga. App. 18 (2003). Acceleration of rent for only a few years, as in the Rosa Mexicano situation, is not considered problematic. Hardin v. Macon Mall, 169 Ga. App. 793 (1984) (acceleration clause enforceable where landlord sought only 2 years of accelerated rent).

Once the distress proceeding is filed, the judge is required by statute to grant and issue a summons to be served on the tenant that specifies a date certain for a final hearing of the issues in not less than 5 nor more than 7 days after the tenant is served. O.C.G.A. § 44-7-72. Every effort must be made by the trial court to expedite the trial of the issues. O.C.G.A. § 44-7-74(c). Few legal remedies advance nearly as swiftly as the distraint remedy. Unlike a dispossessory proceeding (O.C.G.A. §§ 44-7-50 *et seq.*), a distraint proceeding has a specified range of time (5 to 7 days after service of process on the tenant) when a hearing is to take place. This specification of time for the hearing has significant consequences under Georgia law.

Frequently, the request for a jury trial is used as the "magic move" to delay the hearing of the landlord's claims for rent and possession in a dispossessory proceeding for weeks or months. Hill v. Levenson, 259 Ga. 395 (1989) (tenant has right to demand jury trial of dispossessory under O.C.G.A. § 9-11-38 of Georgia Civil Practice Act). By sharp contrast, a landlord who uses a private process server to effectuate service on the date a distraint proceeding is filed can proceed to court on all issues raised in the proceeding as soon as 5 days, and no later than 7 days, from commencement of the action.

One reason for this major distinction between the timing of hearings in dispossessory and distraint proceedings arises from the point of law that the procedure in these special statutory proceedings is governed by the Civil Practice Act except where specific rules of practice and procedure in conflict with that Act are expressly prescribed by law. O.C.G.A. §§ 9-11-1 and 9-11-81. While the distraint remedy expressly prescribes that the time for a hearing is 5 to 7 days after service, a dispossessory, while also an expedited proceeding, does not have such specificity as to when the hearing much occur. Even if a court someday rules as a matter of first impression that a tenant has the right to a jury trial in a distraint proceeding, that jury trial must take place within 7 days at most.

After service of the distress warrant, the tenant cannot lawfully remove its property from the premises without posting a bond and cannot transfer ownership of its property. O.C.G.A. § 44-7-75(d). The bond must equal the lesser of the rent allegedly owed or the value of the tenant's property. O.C.G.A. § 44-7-76. To obtain the benefit of the bond requirement, there must be rent owed. The more rent that is owed, the better for the landlord in terms of this remedy if not otherwise. At the time the tenant answers the affidavit filed to initiate the distress warrant proceeding, the tenant must pay into the registry of the trial court all rent admittedly owed. O.C.G.A. § 44-7-75(a). A tenant's answer is due by the date of the final hearing, but not within any specific number of days after service even where the hearing is rescheduled and delayed for some unavoidable reason. Daniel v. Wells Oil Co., Inc., 205 Ga. App. 331 (1992). The tenant must also pay all rent which becomes due after the issuance of the summons as such rent becomes due. O.C.G.A. § 44-7-75(b). The court is obligated to order the clerk of court to pay the landlord all amounts paid into the registry of the court as such payments are made. O.C.G.A. § 44-7-75(f).

Of course, the acceleration of rent makes all rent for the full lease term immediately due and payable. If the tenant fails to pay rent as specified above or the landlord obtains a judgment at the final hearing, the tenant loses possession of its property and the landlord can execute a levy and sale of the tenant's property. O.C.G.A. §§ 44-7-75(e) and 44-7-79. As a practical matter, the landlord may choose to obtain a court order to allow the landlord to sell the tenant's property by auction at the premises instead of incurring the significant cost of a levy by the sheriff or marshal that necessarily entails removal, storage, advertisement and sale in the usual manner of judgment executions. As another good alternative, the

landlord can negotiate with the tenant for a documented transfer of ownership of tenant's property to the landlord or its designee and a credit to the tenant against the debt owed.

Especially where a commercial tenant is created as a special-purpose entity (SPE), such as a restaurant tenant with just one location, and the landlord does not have the negotiating leverage to insist on personal guarantors of the SPE's lease payment obligations, distraint proceedings provide landlords with a method to perfect security interests in their tenant's property as collateral to secure the SPE's debt. In many situations, a distraint proceeding can also provide a quick, efficient and substantially less expensive method for landlords to obtain substantial monetary judgments against tenants who owe past due rent or breach their leases when they begin the process of removing their property from leased premises prematurely. For all of the reasons discussed above, landlords should not be reluctant to pursue distraint proceedings. This powerful litigation remedy can provide many potential benefits if utilized in the right circumstances.

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