

**Landlord/Tenant Basics**  
**Hon. Kristina Hammer Blum**  
**Chief Magistrate, Gwinnett County Magistrate Court**



**Dispossessory Basics.**

- *Jurisdiction:* Magistrate Courts have jurisdiction to issue writs of possession regardless of the amount of past due rent owed. See O.C.G.A. § 15-10-2(a)(6).
- *Plaintiffs:* A dispossessory action must be brought in the name of the landlord; either a person or an actual legal entity (not just a d/b/a name, *i.e.*, ABC Apartments). If not, the landlord must amend the pleadings for the action to be valid.
- *Defendants:* Dispossessory actions are generally filed against the named tenant in the lease as well as “all other [unnamed] occupants” because there may be other “tenants” who live in the property and, as such, claim a possessory interest.
- *Venue:* The property at issue must be located in the county where the action is filed. If not, the Court must transfer the case to the proper county. See Uniform Magistrate Court Rule 36.

**Is there a Landlord/Tenant Relationship?**

- A dispossessory action is only available to parties who have a landlord/tenant relationship.
- Pursuant to O.C.G.A. § 44-7-1(a): “The relationship of landlord and tenant is created when the owner of real estate grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor.”
- Tenant has only a “usufruct,” which may not be conveyed and is not subject to levy/sale.
- The actual payment of rent is not essential to the creation of a tenancy at will. See Carruth v. Carruth, 77 Ga. App. 131, 135 (1948).

**There are Four Different Types of LL/T Relationships or “Possessory Interests.”**

- Tenancy for Years (duration known from moment of creation).
- Periodic Tenancy (month-to-month leases).
- Tenancy at Will (can be terminated by landlord or tenant upon notice).
  - The notice required to terminate a tenancy at will is sixty (60) days from the landlord or thirty (30) days from the tenant. O.C.G.A. § 44-7-7.
- Tenancy at Sufferance (tenancy arising when a party wrongfully remains in possession after prior lawful possession period expires).

### **Service of Process (O.C.G.A. § 44-7-51).**

- Service may be by “tack and mail” only after personal service is attempted. See O.C.G.A. § 44-7-51(a).
- Any answer must be filed within seven (7) days from the date of service. See O.C.G.A. § 44-7-51(b).
- Where no Answer is timely filed (O.C.G.A. § 44-7-53):
  - If Personal Service: The Court can issue a writ of possession and money judgment for amount claimed as past due rent in the statement of claim.
  - If Tack and Mail Service: The Court can issue the writ of possession ONLY. Personal service is required before a money judgment can be issued.
- A non-named tenant (one or more of the “all other occupants”) may intervene and file an answer if they are claiming a landlord/tenant relationship.

### **The Court Has a Responsibility to Expedite Trials in Dispossessory Proceedings.**

- “Every effort should be made by the trial court to expedite a trial of the issues.” O.C.G.A. § 44-7-53(b).
- O.C.G.A. § 44-7-54(a) provides that where the issue of the right of possession cannot be finally determined ***within two weeks*** from the date of ***service*** of the copy of the summons and copy of the affidavit, the tenant “***shall be required***” to pay into the registry of the trial court:
  - All rent and utility payments, which are the responsibility of the tenant under the lease, as due.
  - If the amount is in dispute, Court can decide amount on affidavits; and
  - Failure to pay, as ordered, results in the immediate issuance of a writ of possession.
- The Court shall order the Clerk to remit to the landlord any funds paid into Court by tenant. If the amount owed is in controversy, the Court shall order the Clerk to disburse the undisputed amount(s) until the remainder can be resolved by hearing.

### **Judgments (O.C.G.A. § 44-7-55).**

- If the landlord loses at trial:
  - Tenant remains in property.
  - Landlord may be liable for damages caused by wrongful conduct if there was a valid counterclaim and sufficient proof.
- If the tenant loses at trial:
  - Writ of possession is issued *instanter in defaults* where tenant has either failed to file a timely answer or fails to appear for trial (default judgment).
  - If tenant answers and appears, writ shall issue on the 8<sup>th</sup> day after the date of the trial. (Tenant has seven (7) days to vacate.)

## **Appeals (O.C.G.A. § 44-7-56).**

- Appeals must be filed within seven (7) days of the date of the judgment. See O.C.G.A. § 44-7-56(b)(1).
- The new appeal process for Magistrate Court has *not* expanded the time for filing an appeal.
- In contested (non-default) cases, the execution of the writ of possession is stayed for seven (7) days. See O.C.G.A. § 44-7-55(a).
- After the notice of appeal is filed, the Clerk shall immediately notify the trial judge. The trial judge then has 15 days to supplement the record with findings of fact and conclusions of law (this is discretionary, not required). See O.C.G.A. § 44-6-56(b)(2).
- *Past Due Rent Paid into the Registry:* If the judgment of the trial court is against the tenant and the tenant appeals, the tenant shall be required to pay into the registry of the Court all sums found by the trial court to be *past due* for rent to remain in possession of the premises. See O.C.G.A. § 44-7-56(b)(3). If not, the reviewing court<sup>1</sup> can issue the writ of possession *instanter*.
- *Future Rent Paid into Registry:* To remain in possession, the tenant shall also be required to pay *all future rent* as it becomes due into the registry until the issue has been finally determined on appeal. See O.C.G.A. § 44-7-56(b)(3). If not, the reviewing court can issue the writ of possession *instanter*.
- If the landlord and the tenant disagree as to the amount of rent to be paid into the registry pending appeal, the Court must look to the lease agreement. However, if no written rental agreement exists, the Court shall require the amount of rent to be a sum equal to the last previous rental payment made by the tenant and accepted by the landlord without written objection. See O.C.G.A. § 44-7-54(a)(1).

## **Demand for Possession (O.C.G.A. § 44-7-50).**

- The landlord must provide notice of demand for possession, which may be verbal or written.
- Notice must state that, if the tenant does not vacate by a certain date, then the landlord will begin dispossessory proceedings.
- If no demand for possession is made, then the dispossessory must be dismissed.
- Where there is a failure to make demand:
  - If raised in the answer, landlord has the burden to prove demand was made.
  - If not raised in the answer, tenant has the burden.

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<sup>1</sup> Pursuant to the new “Superior and State Court Appellate Practice Act” effective July 1, 2023, the “reviewing court” is the State or Superior Court receiving the appeal. See O.C.G.A. § 5-3-1, *et seq.*

### **Offer to Pay (O.C.G.A. § 44-7-52).**

- In a residential dispossessory action for nonpayment of rent, the tenant shall be allowed to tender to the landlord all rents allegedly owed plus court costs within seven (7) days of service of the summons. Such a tender shall be a complete defense to the action (and the only real defense to a non-payment breach case).
- This defense (full tender of all past due rent plus court costs) is available only available once in a 12-month period with the same landlord.
- If the rent is offered and accepted by the landlord, the dispossessory must be dismissed. If the rent is offered and the landlord refuses, the tenant must indicate this in their answer and establish same at trial.
- If the tenant prevails on this defense at trial, the Court must order the money to be paid into the Registry within three (3) business days. If it is not paid within three (3) business days, then the writ of possession shall issue.
- ***Inability to pay due to any financial circumstances of the tenant is NOT a valid legal defense.***

### **Security Deposit Issues (O.C.G.A. § 44-7-30, et seq.).**

- ***Security deposits are not part of the writ proceedings.*** Pursuant to O.C.G.A. § 44-7-34(a), “within one month after the termination of the residential lease or the surrender and acceptance of the premises, whichever occurs last, a landlord shall return to the tenant the full security deposit...” *For this reason, security deposit issues are not ripe until after the writ has issued.*
- The landlord must provide notice to the tenant of the specific basis for retention of any portion of the deposit (normal wear and tear does not count). Landlord may retain security deposit for nonpayment of rent, unpaid fees, unpaid utilities, or for actual damages caused by the tenant's breach (provided the landlord attempts to mitigate the damages).
- Security deposit disputes are generally handled in regular Magistrate Court civil proceedings (small claims) because it is the tenant who brings the action for non-return of the deposit. See O.C.G.A. § 44-7-33.

### **Duty to Repair (O.C.G.A. § 44-7-13).**

- The landlord has a duty to keep the premises in repair. See O.C.G.A. § 44-7-13.
- In a nutshell, the tenant can repair and deduct repair costs from the rent due *only if they do the following*:
  - Tenant must first give landlord notice and reasonable time to repair;
  - Tenant must *also* have proof (usually receipts) to show the costs of the repair; **and**
  - Tenant must have paid *as rent* the difference between rent and repair costs.

See Lewis & Company v. Chisholm, 68 Ga. 40 (1881); Borochoff Properties, Inc. v. Creative Printing Enterprises, Inc., 233 Ga. 279, 279 (1974).

### Foreclosures.

- When an eviction is filed by the purchaser or bank following a foreclosure sale, the alleged invalidity of the foreclosure sale *cannot be asserted as a defense in a subsequent dispossessory proceeding*. Jackman v. LaSalle Bank, N.A., 299 Ga. App. 894, 895 (2009) (citing Hurt v. Norwest Mtg., 260 Ga. App. 651, 659 (2003)).
- The only proof that is required for the dispossessory proceeding is a *recorded* deed under power of sale.
- “Claimed defects in the landlord's title to premises cannot be raised as a defense to a proceeding for possession under O.C.G.A. § 44–7–50, et seq.” Sanders v. Daniel, 302 Ga. App. 350, 351 (2010)(quoting Good Ol' Days Commissary v. Longcrier Family Ltd. Partnership I, 240 Ga. App. 111, 113 (1999).
- If the defendant (who is really a tenant at sufferance following foreclosure) wants to contest the foreclosure, they must do so in a separate action for wrongful foreclosure in Superior Court.
- ***Contesting the foreclosure does not automatically stop or stay the eviction.*** If there is a pending Superior Court action, it would be up to the Superior Court to enjoin the *execution* of the writ (*i.e.* the set out), not the issuance of the writ by the Magistrate Court).

### Attorney Fees.

- Attorney’s fees are not that common in residential evictions. They are, however, more common in commercial evictions.
- There must be personal service to consider attorney’s fees; tack and mail is not sufficient.
- To award attorney’s fees in a dispossessory proceeding, the answer to all four questions below must be “yes:”
  1. Are attorney’s fees in the lease?
  2. Are attorney’s fees mutual (meaning tenant can recover if tenant wins)?
  3. Are attorney’s fees plead for in the complaint?
  4. Was notice of intent to collect attorney’s fees sent if rent not paid 10 days from receipt of letter (O.C.G.A. § 13-1-11)?