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Construction Law

by Frank O. Brown, Jr.*

I. INTRODUCTION

This Article focuses on noteworthy decisions by Georgia appellate courts and Georgia federal district courts between June 1, 2018 and May 31, 2019, that are relevant to the practice of construction law.¹

II. ARBITRATION

In *Web IV, LLC v. Samples Construction, LLC*,² the defendants contended that the plaintiff construction company had waived its right to compel arbitration by allegedly failing to comply with a provision in the subject contract requiring a pre-arbitration attempt to resolve the dispute through the parties' respective representatives.³ The issue before the Georgia Court of Appeals was whether the court or the arbitrator should decide the waiver issue.⁴

The court held that the arbitrator should decide that issue for several reasons, including that it was a threshold procedural issue rather than a threshold issue of substantive arbitrability.⁵ The court distinguished threshold procedural waiver issues that grow out of the dispute, such as the subject waiver issue, from threshold substantive conduct-based waiver issues.⁶

In deciding if the arbitrator, rather than the court, should decide the waiver issue, the court also relied on two other factors. One was the

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1. For an analysis of construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 70 MERCER L. REV. 51 (2018).

2. 349 Ga. App. 607, 824 S.E.2d 107 (2019).

3. *Id.* at 607, 824 S.E.2d at 108.

4. *Id.* at 609, 824 S.E.2d at 110.

5. *Id.* at 611, 824 S.E.2d at 111.

6. *Id.*

significant breadth of the parties' arbitration provision, which was actually rather standard in its breadth, and which stated that all claims "arising out of or relating to the Agreement" were subject to arbitration.⁷ The second factor was that the arbitration provision incorporated the American Arbitration Association Construction Industry Arbitration Rules, which gave the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."⁸

In *Original Appalachian Artworks, Inc. v. Jakks Pacific, Inc.*,⁹ the arbitrator awarded attorney's fees and expenses to Original Appalachian Artworks, Inc., after which Jakks Pacific, Inc. (Jakks) filed a motion seeking to vacate that award.¹⁰ The parties disagreed about whether the motion was to be determined under the relevant provision of the Federal Arbitration Act¹¹ or the Georgia Arbitration Code.¹² The United States District Court for the Northern District of Georgia did not decide that issue because it determined that the result would be the same under either provision.¹³

One of the grounds for vacating an award under the Federal Arbitration Act is that the arbitrator exceeded his power.¹⁴ Jakks argued the arbitrator had exceeded his power because he had awarded fees and expenses for a period of ten months of arbitration when the arbitration provision of the parties' contract stated that the arbitration should be conducted within sixty days from the demand for arbitration.¹⁵ The court rejected that argument, noting that under the cited case law, an arbitrator does not exceed his authority even if the award is based on an "incorrect legal conclusion" or a "manifest disregard of the law."¹⁶ The court determined that in order to uphold the award against a contention that the arbitrator exceeded his power, it is sufficient to demonstrate that the arbitrator even arguably interpreted the parties' contract.¹⁷ The court found that it was clear

7. *Id.*

8. *Id.* at 612–13, 824 S.E.2d at 112.

9. No. 1:14-CV-02861-ELR, 2018 WL 7823065 (N.D. Ga. June 7, 2018).

10. *Id.* at *1.

11. 9 U.S.C. §§ 1–16 (2019).

12. O.C.G.A. §§ 9-9-1–9-9-18 (2019).

13. *Jakks Pacific, Inc.*, 2018 WL 7823065, at *2.

14. 9 U.S.C. § 10(a)(4) (2019).

15. *Jakks Pacific, Inc.*, 2018 WL 7823065, at *3.

16. *Id.*

17. *Id.* at *4.

from the evidence that the arbitrator had, in fact, interpreted the arbitration provision of the contract.¹⁸

Another one of the grounds for vacating an award under the Georgia Arbitration Code is that the arbitrator manifestly disregarded the law.¹⁹ Jakks contended that the arbitrator manifestly disregarded the law, in part, because he should have limited attorney's fees and expenses to the sixty-day period mentioned in the parties' arbitration provision.²⁰ The trial court noted that to prove manifest disregard of the law, a party must demonstrate more than that the arbitrator misapplied the law to the facts or incorrectly interpreted the law.²¹ Instead, the party must provide evidence of record that the correct law was communicated to the arbitrator, and the arbitrator intentionally and knowingly chose to ignore that law.²² The court concluded that Jakks had failed to provide that evidence.²³ Thus, the court also declined to vacate the award under the Georgia Arbitration Act.²⁴

III. CONTRACT DISCLAIMERS

An issue in *Georgian Fine Properties, LLC v. Lang*,²⁵ was whether the plaintiff homeowners' negligent construction claims against the seller, who was also the contractor that had renovated the home, were barred by a provision in the parties' agreement that "[i]n the event Buyer does not terminate this Agreement prior to the end of the Due Diligence period, then . . . Buyer shall have accepted the Property 'as is' subject to the terms of this Agreement[.]"²⁶ The plaintiffs did not terminate the agreement.²⁷

The Georgia Court of Appeals held that the "as is" provision did not bar plaintiffs' negligent construction claims.²⁸ The court stated that the "as is" provision bars only breach of warranty claims, not negligent construction claims.²⁹

18. *Id.*

19. O.C.G.A. § 9-9-13(b)(5) (2019).

20. *Jakks Pacific, Inc.*, 2018 WL 7823065, at *5.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at *6.

25. 347 Ga. App. 635, 820 S.E.2d 464 (2018).

26. *Id.* at 637–38, 820 S.E.2d at 466–67.

27. *Id.* at 637, 820 S.E.2d at 466.

28. *Id.* at 638, 820 S.E.2d at 466.

29. *Id.* at 638, 820 S.E.2d at 467.

IV. DAMAGES LIMITATIONS

Construction-related contracts sometimes include damages limitations and other exculpatory provisions. Although not involving a construction contract, *Warren Averett, LLC v. Landcastle Acquisition Corporation*,³⁰ addressed the enforceability of a damages limitation provision in a series of an accounting firm's audit contracts with a law firm.³¹ The provision stated that "[i]n any event, no claim shall be asserted which is in excess of the lesser of actual damages incurred or professional fees paid to us for the engagement."³² The fees paid by the accounting firm totaled about \$87,000. The actual damages alleged by the plaintiff, which was an assignee of the law firm, were in excess of \$17,500,000.³³ Thus, the enforceability of the damages limitation was critical to the defense of the claim.

The court of appeals affirmed the trial court's ruling that the damages limitation was unenforceable as a matter of law because it was insufficiently prominent.³⁴ According to the court, exculpatory clauses, including damages limitations, must be explicit, clear, unambiguous, and prominent.³⁵ The court noted that in determining whether an exculpatory provision is sufficiently prominent, courts consider a number of factors, including whether it is in a separate paragraph, has a separate heading, or is distinguished by features like font size.³⁶

The court held that the subject damages limitation provision failed the prominence element because it was in the same font as the rest of the subject agreements, was not capitalized, italicized, or set in bold type for emphasis, was not in a separate section that specifically and only addressed recoverable damages, and was not in a prominent place within the contracts that emphasized its importance, such as being next to the parties' signature lines.³⁷

In *US Nitrogen, LLC v. Weatherly, Inc.*,³⁸ the United States District Court for the Northern District of Georgia considered whether a contract provision was a permissible damages limitation or an impermissible indemnification provision in violation of O.C.G.A.

30. 349 Ga. App. 479, 825 S.E.2d 864 (2019).

31. *Id.* at 479, 825 S.E.2d at 865.

32. *Id.* at 481, 825 S.E.2d at 867.

33. *Id.* at 481, 825 S.E.2d at 866.

34. *Id.* at 484, 825 S.E.2d at 868.

35. *Id.* at 483, 825 S.E.2d at 868.

36. *Id.* at 484, 825 S.E.2d at 868–69.

37. *Id.* at 484–85, 825 S.E.2d at 869.

38. 343 F. Supp. 3d 1354 (N.D. Ga. 2018).

§ 13-8-2(b),³⁹ which restricts indemnification provisions in construction-related contracts.⁴⁰ The subject contract provision stated “Weatherly’s total aggregate liability to [USN], except with respect of Weatherly’s cost of performing the Work under the Contract, for all causes including defects, Weatherly defaults, default of any warranties, or guarantees, patent infringement, or otherwise, shall not exceed fifteen percent (15%) of the Price.”⁴¹

The district court concluded that this provision merely limited Weatherly’s liability to US Nitrogen, not to third parties.⁴² Thus, it was an enforceable damages limitation provision and not an unenforceable indemnification under O.C.G.A. § 13-8-2(b) by US Nitrogen of Weatherly as to claims by third parties.⁴³

V. INDEMNIFICATION PROVISIONS⁴⁴

Construction and construction-related contracts frequently include indemnification provisions. At issue in *Sherwood v. Williams*,⁴⁵ was whether an indemnification provision covered the negligence of the indemnitee.⁴⁶ That provision stated that the tenant indemnitor would hold the landlord indemnitee harmless from any liability or damage, whether caused by the indemnitor’s “operations or otherwise.”⁴⁷ The indemnitee argued that this language covered claims against the indemnitee for the indemnitee’s own negligence.⁴⁸

The court of appeals rejected that argument noting longstanding Georgia law that indemnification provisions do not cover losses caused by the indemnitee’s own negligence unless the contract expressly, plainly, clearly, and unequivocally so states.⁴⁹ Some construction or construction-related contracts include broad indemnification provisions that nevertheless do not expressly state that the indemnitee’s own

39. O.C.G.A. § 13-8-2(b) (2019).

40. *US Nitrogen, LLC*, 343 F. Supp. 3d at 1358.

41. *Id.* at 1359 (emphasis omitted).

42. *Id.* at 1360.

43. *Id.*

44. See also *US Nitrogen, LLC*, 343 F. Supp. 3d 1354 (N.D. Ga. 2018) in the immediately preceding section of this article.

45. 347 Ga. App. 400, 820 S.E.2d 141 (2018).

46. *Id.* at 405, 820 S.E.2d at 145.

47. *Id.*

48. *Id.* at 402, 820 S.E.2d at 143.

49. *Id.* at 405, 820 S.E.2d at 145.

negligence is covered by that provision.⁵⁰ Careful drafting of indemnification provisions is particularly important.

VI. WITNESS VALUE TESTIMONY

The main issue in *Woodrum v. Georgia Farm Bureau Mutual Insurance Company*,⁵¹ a suit by homeowners against their homeowners insurer, was whether the trial court abused its discretion in granting a motion to exclude a contractor's testimony about the diminution in value of a house due to fallen tree damage.⁵²

The court of appeals first addressed whether the contractor should have been allowed to testify as an expert.⁵³ Applying O.C.G.A. § 24-7-702(b),⁵⁴ the court determined that the trial court had not abused its discretion in barring the contractor from testifying as an expert based on the trial court's determination that the contractor's estimate of diminution in value was not based on any market comparison or related methodology, and that his methodology was not sufficiently reliable.⁵⁵

In considering whether the trial court should have allowed the contractor to testify as a lay witness, the court noted that O.C.G.A. § 24-7-701⁵⁶ states that "[a] witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion."⁵⁷ The key question on this issue, therefore, was whether the contractor had an opportunity to form a reasoned opinion.⁵⁸

The evidence provided in response to the insurer's motion to exclude the contractor's testimony included that the contractor was a licensed contractor, was experienced in home building and remodeling, was familiar with the cost of construction and home values, had performed repairs of the subject home, had determined that the house suffered massive structural damage from the fallen tree,⁵⁹ believed that the

50. Drafters of indemnification provisions should also remember that O.C.G.A. § 13-8-2 forbids an indemnification provision in a construction-related contract from providing for indemnification of the indemnitee against the indemnitee's sole negligence.

51. 347 Ga. App. 89, 815 S.E.2d 650 (2018).

52. *Id.* at 89, 815 S.E.2d at 651.

53. *Id.*

54. O.C.G.A. § 24-7-702(b) (2019).

55. *Woodrum*, 347 Ga. App. at 91–92, 815 S.E.2d at 652–53.

56. O.C.G.A. § 24-7-701 (2019).

57. *Woodrum*, 347 Ga. App. at 92, 815 S.E.2d at 653.

58. *Id.*

59. Not addressed by the court, or apparently the parties, was whether the contractor, who was apparently not a professional engineer, was competent to testify about structural issues upon which he based his lay opinion of value.

foundation slab might reopen, and believed that a purchaser of the home would be expected to pay less for the home given its cracked slab.⁶⁰ The court of appeals held that this experience provided the contractor an opportunity to form a reasoned opinion and that the trial court abused its discretion in excluding his testimony as a lay witness.⁶¹

VII. ACCEPTANCE DOCTRINE

In *Thomaston Acquisition, LLC v. Piedmont Construction Group, Inc.*,⁶² the Georgia Supreme Court addressed two certified questions from the United States District Court for the Middle District of Georgia.⁶³ Those questions arose out of a lawsuit in the district court in which the purchaser of an apartment complex from its original owner asserted negligent construction and breach of contract/implied warranty claims against the general contractor that constructed the complex for the original owner.⁶⁴

The certified questions, which related only to the negligent construction claim, were:

1. After construction of real property is completed, and the property is sold by the original owner to a subsequent bona fide purchaser, does the acceptance doctrine apply to a negligent construction claim brought by a subsequent purchaser who is the current owner-operator of the property at issue?
2. If the acceptance doctrine does apply, to whose inspection does the analysis of whether the defect(s) was “readily observable on reasonable inspection” relate: the original owner’s inspection, or a subsequent owner’s inspection?⁶⁵

The Georgia Supreme Court described the acceptance doctrine as follows:

[A]n independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer and the same has been

60. *Woodrum*, 347 Ga. App. at 92–93, 815 S.E.2d at 653.

61. *Id.* at 93, 815 S.E.2d at 654.

62. 306 Ga. 102, 829 S.E.2d 68 (2019).

63. *Id.* at 102, 829 S.E.2d at 70.

64. *Id.*

65. *Id.* at 103, 829 S.E.2d at 70.

accepted by him, though the injury result from the contractor's failure to properly carry out his contract.⁶⁶

The court noted that the acceptance doctrine is typically asserted in the context of post-acceptance claims for personal injury or damage to other property caused by defective construction work, rather than in the context of claims based on the defective work itself.⁶⁷

However, in response to the first certified question, the court stated that under Georgia law the acceptance doctrine does apply to a negligent construction claim against the original contractor brought by a purchaser of the property from the original owner.⁶⁸ Because that doctrine applies, the contractor is not liable to the purchaser for negligent construction unless an exception to the acceptance doctrine applies.⁶⁹

The most significant exception noted by the court is for damages arising from a defect hidden from reasonable inspection. Other exceptions are also noted in the opinion.⁷⁰ In response to the second certified question, the court stated that under the hidden-defect exception, a party asserting a negligent construction claim must show that the defect was not "readily observable on reasonable inspection" at the time that the work was accepted by the original owner—not at the time that it was purchased by the subsequent purchaser.⁷¹

VIII. APPORTIONMENT OF DAMAGES

Apportionment of damages under O.C.G.A. § 51-12-33⁷² can be important in construction damages claims. Although the case was not a construction case, *Federal Deposit Insurance Corporation v. Loudermilk*⁷³ addressed an issue potentially relevant to construction cases. That question, which had been certified to the Georgia Supreme Court by the United States Court of Appeals for the Eleventh Circuit because of the lack of an earlier opinion by the Georgia appellate courts

66. *Id.* at 104, 829 S.E.2d at 71.

67. *Id.* at 104 n.1, 829 S.E.2d at 71 n.1.

68. *Id.* at 103, 829 S.E.2d at 70.

69. *Id.* at 106, 829 S.E.2d at 72.

70. *Id.* at 107–08, 829 S.E.2d at 73.

71. *Id.* at 108, 829 S.E.2d at 74. (Not addressed by the court was whether a plaintiff purchaser/second owner must also demonstrate in connection with establishing a negligent construction claim against the original contractor that the alleged defect was a latent defect at the time of the plaintiff's purchase. *See generally* *Worthey v. Holmes*, 249 Ga. 104, 287 S.E.2d 9 (1982). That additional proof would seem to also be required.)

72. O.C.G.A. § 51-12-33 (2019).

73. 305 Ga. 558, 826 S.E.2d 116 (2019).

squarely addressing it,⁷⁴ was whether O.C.G.A. § 51-12-33 abrogated Georgia's common-law rule imposing joint and several liability on tortfeasors who act in concert.⁷⁵

The Georgia Supreme Court responded

that O.C.G.A. § 51-12-33 did not abrogate Georgia's common-law rule imposing joint and several liability on tortfeasors who act in concert insofar as a claim of concerted action invokes the narrow and traditional common-law doctrine of concerted action based on a legal theory of mutual agency, and thus imputed fault.⁷⁶

The court emphasized that its holding encompassed only traditional concerted action, as it was understood at common law, for the basic reason that fault in such scenarios is not divisible.⁷⁷ It added that it reached its conclusion after employing the touchstone inquiry in the apportionment statute, which is whether fault is divisible.⁷⁸

IX. LIQUIDATED DAMAGES

Construction contracts often contain liquidated damages provisions. Those provisions are enforceable if they meet certain conditions, including that, if at the time of contracting, damages are difficult or impossible to estimate. In *Spirits, Inc. v. Patel*,⁷⁹ the Georgia Court of Appeals stated that the alleged liquidated damages provision was unenforceable because the damages were, in fact, not difficult or impossible to estimate, and the party asserting the existence of the liquidated damages provision had acknowledged as much during argument at trial.⁸⁰ This opinion implies that merely stating in the contract that damages are difficult or impossible to estimate (which the subject contract did not do) may not lead to an enforceable liquidated damages provision if those damages are, in fact, not difficult or impossible to estimate.⁸¹

74. 887 F.3d 1250, 1250–51 (11th Cir. 2018).

75. The Eleventh Circuit also certified two other questions to the Georgia Supreme Court. See *Loudermilk*, 305 Ga. at 560, 826 S.E.2d at 118–19.

76. *Id.* at 560, 826 S.E.2d at 119.

77. *Id.* at 576, 826 S.E.2d at 129.

78. *Id.*

79. 350 Ga. App. 153, 828 S.E.2d 381 (2019).

80. *Id.* at 156, 828 S.E.2d at 385.

81. *Id.*

X. IMPLIED WARRANTY OF MERCHANTABILITY FOR EQUIPMENT

*Trane US Inc. v. Yearout Service, LLC*⁸² involved a counterclaim by a general contractor against the HVAC equipment supplier to a subcontractor. The United States District Court for the Middle District of Georgia treated that claim as one for breach of the implied warranty of merchantability under O.C.G.A. § 11-2-314.⁸³ The HVAC supplier moved for summary judgment on that counterclaim arguing that a warranty claim under O.C.G.A. § 11-2-314 can only be asserted by someone in privity with the equipment seller.⁸⁴

The general contractor acknowledged that general rule, but contended that (1) it was, in fact, in privity with the HVAC supplier; and (2) it was an intended third-party beneficiary of the contract between itself and its subcontractor, thereby allowing it to enforce that contract under O.C.G.A. § 9-2-20(b),⁸⁵ which states that “[t]he beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract.”⁸⁶

In support of its contention that it was in privity with the HVAC supplier, the general contractor asserted two arguments. First, it contended that the HVAC supplier was aware that the design and work it was performing was to help the general contractor comply with its agreement with the United States Army Corp of Engineers, which was the owner of the subject project.⁸⁷ The court rejected that argument stating that even if true, it did not establish privity.⁸⁸ Second, the general contractor contended that its agreement with the subcontractor allowed the general contractor to require its subcontractor to assume the obligations of the subcontractor to the general contractor.⁸⁹ The district court also rejected that argument, pointing out that there was no evidence that the general contractor actually required the subcontractor to subcontract on those conditions or how that permissible language would establish privity.⁹⁰

The court further rejected the general contractor’s assertion that it was an intended third-party beneficiary of the warranty from the

82. No. 5:17-cv-00042-MTT, 2018 U.S. Dist. LEXIS 210151 (M.D. Ga. Dec. 13, 2018).

83. O.C.G.A. § 11-2-314 (2019).

84. *Trane US Inc.*, 2018 U.S. Dist. LEXIS 210151, at *2.

85. O.C.G.A. § 9-2-20(b) (2019).

86. *Trane US Inc.*, 2018 U.S. Dist. LEXIS 210151, at *5–7.

87. *Id.* at *6.

88. *Id.*

89. *Id.*

90. *Id.* at *7.

HVAC supplier to the subcontractor.⁹¹ It also stated that the general contractor was not a “natural person” under O.C.G.A. § 11-2-318,⁹² and therefore warranty rights did not extend to it under that code section.⁹³

For these reasons, the court granted the HVAC supplier’s motion for summary judgment.⁹⁴

XI. STATUTE OF REPOSE

*Georgia Southern University Housing Foundation One, LLC v. Capstone Development Corp.*⁹⁵ addressed issues relating to Georgia’s construction-related statute of repose at O.C.G.A. § 9-3-51.⁹⁶ Subject to a limited exception in O.C.G.A. § 9-3-51(b), the statute states that an action for a construction-related claim is barred if not brought within eight years after substantial completion of the improvement.⁹⁷

More than eight years after substantial completion of the subject project, the plaintiff filed a demand for arbitration against JLB Construction LP (JLB), an entity that had not previously been a party to this lawsuit. JLB filed a motion in the lawsuit to enjoin the arbitration claim against it. In response, the plaintiff filed a motion to amend its complaint to add JLB as a defendant.⁹⁸ Although the plaintiff acknowledged that more than eight years had expired since substantial completion of the project, it argued that the statute of repose did not bar the claims against JLB because those claims related back under Federal Rule of Civil Procedure 15(c)(1)(B)⁹⁹ to the date that the lawsuit was originally filed against other defendants and that JLB was equitably estopped from asserting the statute of repose as a defense.¹⁰⁰

The United States District Court for the Southern District of Georgia rejected the plaintiff’s relation-back argument for two reasons. First, it did so because, under Rule 15(c)(1)(C),¹⁰¹ a claim relates back only when it “changes the party or the naming of the party against whom a claim

91. *Id.* at *8.

92. O.C.G.A. § 11-2-318 (2019).

93. *Trane US Inc.*, 2018 U.S. Dist. LEXIS 210151, at *9.

94. *Id.*

95. No. 6:11-cv-104, 2018 U.S. Dist. LEXIS 176075 (S.D. Ga. Oct. 12, 2018).

96. O.C.G.A. § 9-3-51(b) (2019).

97. A construction-related claim may also be barred by an earlier expiring statute of limitation, such as the six-year statute of limitations for breach of contract at O.C.G.A. § 9-3-24 or the four-year statute of limitations for negligent construction at O.C.G.A. § 9-3-30(a). *Ga. S. Univ. Hous. Found. One, LLC*, 2018 U.S. Dist. LEXIS 176075, at *11.

98. *Id.* at *6–8.

99. FED. R. CIV. P. 15(c)(1)(B).

100. *Ga. S. Univ. Hous. Found. One, LLC*, 2018 U.S. Dist. LEXIS 176075, at *6–7.

101. FED. R. CIV. P. 15(c)(1)(C).

is asserted.”¹⁰² That code subsection does not apply when, as here, the plaintiff seeks to join an entirely new defendant in addition to existing defendants.¹⁰³ Second, the court rejected the relation-back argument because it was ineffective against a statute of repose.¹⁰⁴

The court also rejected the plaintiff’s argument that JLB was equitably estopped from asserting the statute of repose.¹⁰⁵ The court noted that, although a statute of repose cannot be tolled even in the face of a defendant’s fraud, a defendant can, in narrow circumstances, be equitably estopped from asserting the statute of repose as a defense.¹⁰⁶ Specifically, there must be evidence of the defendant’s fraud or other conduct, which occurred after the accrual of a plaintiff’s claim, on which that plaintiff reasonably relied in forbearing to bring a lawsuit.¹⁰⁷

Here, the plaintiff contended that equitable estoppel applied because JLB concealed its involvement in relevant repair work.¹⁰⁸ Rejecting that argument, the court noted that the proposed amended complaint did not allege sufficient facts to support that argument because allegations of fraud and equitable estoppel must be supported by facts plead with particularity.¹⁰⁹ The court also noted that the plaintiff failed to show in its motion to amend how JLB’s alleged concealment of its involvement in the repairs prevented the plaintiff from learning about its involvement, and failed to show that it had relied on an assertion or action by JLB in forbearing to formally assert its claims against JLB.¹¹⁰

For these reasons, the district court determined that the plaintiff’s motion to amend its complaint to assert claims against JLB was futile.¹¹¹ Therefore, the court denied that motion.¹¹²

102. *Ga. S. Univ. Hous. Found. One, LLC*, 2018 U.S. Dist. LEXIS 176075, at *14 (emphasis omitted).

103. *Id.* at *14–15.

104. *Id.* at *15.

105. *Id.* at *17–18.

106. *Id.* at *17.

107. *Id.* at *17–18.

108. *Id.* at *18.

109. *Id.*

110. *Id.* at *19–20.

111. *Id.* at *22–23.

112. *Id.* at *23.