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Real Property

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I. INTRODUCTION

This Article surveys developments in Georgia real property law between June 1, 2021 and May 31, 2022.[1] The 2021 Calendar year saw interest rates on a fixed-rate thirty-year mortgage hover at or around roughly 3%—oftentimes actually being below 3%.[2] Since the beginning of 2022, those rates have continued on a nearly steady climb, with the average rate for a thirty-year fixed-rate mortgage for the week of May 26, 2022, clocking in at over 5%, a staggering difference from the year before.[3] Rising interest rates have likely cooled demand for refinances.[4] Nationally, while 2022 is showing a decline in new purchase mortgage originations,[5] prices in Georgia still appear to be on the increase.[6] In fact, the Georgia Association of Realtors' Monthly Housing Indicators show a 22% increase in the median and an increase of the average sales price of

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1. For an analysis of real property during the prior survey period, *see* Erica Burchell, *Real Property*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 217 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/15/ [https://perma.cc/5N9J-A58R].

2. *Compilation of Weekly Survey Data for 2021*, FREDDIEMAC, https://www.freddiemac.com/pmms/archive?year=2021/ (last visited Nov. 29, 2022) [https://perma.cc/5Q42-SVXB].

3. *Compilation of Weekly Survey Data for 2022*, FREDDIEMAC, https://www.freddiemac.com/pmms/archive?year=2022/ (last visited Nov. 29, 2022) [https://perma.cc/VZV7-SVPN].

4. Stacy Cowley, *The Refinancing Boom is Ebbing as Mortgage Rates Rise*, N. Y. TIMES (May 10, 2022), https://www.nytimes.com/2022/05/10/business/refinancing-mortgage-rates.html/ [https://perma.cc/92UF-LNEE].

5. Andrew Haughwout et al., *Refinance Boom Winds Down*, LIBERTY STREET ECONOMICS (May 10, 2022), https://libertystreeteconomics.newyorkfed.org/2022/05/refinance-boom-winds-down/ [https://perma.cc/J6YF-NLDR].

6. *New Listings Increase in Georgia Housing Market in May*, GEORGIA REALTORS, https://garealtor.com/new-listings-increase-in-georgia-housing-market-in-may/ (last visited Aug. 16, 2022) [https://perma.cc/JHV9-422T].

over 15%.[7] Moreover, the report indicates that houses in Georgia sat on the market for an average of just twenty-two days in the month of May.[8] As the year moves into its second half, homebuyers, lenders, bankers, and closing attorneys will just have to watch and see where inflation, interest rates, and the housing market will head.

II. NEW LEGISLATION: GEORGIA HOUSE BILL 974

Two important changes are coming to real estate records in Georgia thanks to Georgia House Bill 974.[9] First, all Superior Court Clerk's Offices (Clerk's Offices) in Georgia will be required to offer electronic filing.[10] Second, the bill sets out what information must be included on the first page of deeds to secure debt starting on July 1, 2023.[11] Both of these changes could significantly impact attorneys practicing in the realm of real property because the changes are practical—rather than theoretical.

A. E-Recording

While many county Clerk's Offices in Georgia already support the electronic filing of real estate records, presently some Clerk's Offices only support paper filings.[12] By July 1, 2023, however, the option to electronically file deeds, mortgages, plats, and more will be available in all Georgia Clerk's Offices.[13] Moreover, Clerk's Offices must have a public computer terminal available that grants filers access to the Georgia Superior Court Clerk's Cooperative Authority's portal for electronic filing.[14]

Notably, the bill does not make electronic filing of real estate records mandatory.[15] Instead, the bill mandates that Clerk's Offices provide the option of electronic filing for real estate records.[16] Admittedly, for attorneys, bankers, title examiners, and other people involved in real estate practice primarily in counties that already offer electronic filing, this part of the bill may not appear particularly groundbreaking.

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7. *Id.*
8. *Id.*
9. Ga. H.R. Bill 974, Reg. Sess., 2022 Ga. Laws 754.
10. *Id.*
11. *Id.*
12. GEORGIA SUPERIOR COURT CLERK'S OFFICE, https://efile.gsccca.org/Home.aspx (last visited Aug. 16, 2022) [https://perma.cc/355C-G9BB].
13. Ga. H.R. Bill 974, 2022 Ga. Laws 754.
14. *Id.*
15. *Id.*
16. *Id.*

However, this bill will undoubtedly impact real estate law practices in Georgia counties where Clerk's Offices do not currently offer the option to electronically file real estate records.

B. Changes to the First Page of Deeds to Secure Debt

Lenders and attorneys currently preparing their deeds to secure debt on letter-sized paper may need to consider switching to legal-sized paper, as Georgia House Bill 974 makes one other critical change to the filing of real estate records in Georgia. Beginning July 2023, the first page of all deeds to secure debt must include the document's date, the names of all document signatories, the mailing address of the grantee, the initial maturity date of the debt, the intangible tax amount, and the original loan amount, among other things.[17] In reality, compressing all that information onto the first page of a deed to secure debt may be a tall order. This is especially apparent when factoring in the space required for the Clerk's Office to stamp recording information on the deed to secure debt once filed. Certainly, though, once put into place, this change will mean that the deed to secure debt's most pertinent practical information will be easier to find—for debtors, lenders, court clerks, attorneys, and future title examiners alike.

III. EASEMENTS

Last year's real property survey of the *Annual Survey of Georgia Law* outlined the case of *Doxey v. Crissey*[18] and the dispute over a bridle trail easement located within the Oakton Subdivision.[19] *Doxey* is an interesting case—not only for its unique facts but also because it was heard by the Georgia Court of Appeals on two separate occasions.[20] The court of appeals issued its second opinion in the case on June 10, 2021, falling just outside the prior survey period.[21]

When the case was decided for the second time by the trial court, the Cobb County Superior Court again granted a declaratory judgment and injunctive relief to the Oakton subdivision's residents.[22] Doxey appealed. In *Doxey II*,[23] the sequel, homeowner Doxey contended the trial court

17. *Id.*

18. 355 Ga. App. 891, 846 S.E.2d 166 (2020) (hereinafter *Doxey I*); *see also* Burchell, *Real Property*, 73 MERCER L. REV. 217.

19. *Doxey I*, 355 Ga. App. at 891, 846 S.E.2d at 168.

20. *Id.* at 891, 846 S.E.2d at 166; *see also* Doxey v. Crissey, 359 Ga. App. 695, 859 S.E.2d 849 (2021) (hereinafter *Doxey II*).

21. *Doxey II*, 359 Ga. App. at 695, 859 S.E.2d at 849.

22. *Id.* at 699, 859 S.E.2d at 852.

23. *Id.* at 695, 859 S.E. 2d at 849.

erred again—slipping up this time by failing to hold a hearing or permitting the parties to make additional arguments prior to issuing its decision in the case.[24] The court of appeals agreed with Doxey and vacated the trial court's judgment.[25]

The first time *Doxey* was decided at the appellate level, the court of appeals vacated the trial court's order and remanded the case "for proceedings consistent with [that] opinion."[26] The trial court, however, merely amended its initial order.[27] Following the second trial court order, Doxey's new appeal gave the court of appeals an opportunity to set out a rule that had previously only been laid out in dicta.[28] The rule emerging from *Doxey II* is this: when the court of appeals says "for proceedings" or "for further proceedings," it obligates the trial court to hold a hearing or, at a minimum, to allow parties to submit additional briefing addressing the remanded issue.[29] The court reasoned that in this instance, Doxey should have been at least granted the opportunity to address, by supplemental brief, the change in the easement's use and the impact the change had on Doxey and her property.[30] So again, the court of appeals vacated the trial court's order and remanded the case "for further proceedings."[31]

IV. LANDLORD AND TENANT

In this Survey period, the Georgia Court of Appeals dealt extensively with the relationship between landlords and tenants—further carving out and clarifying where the rights of one begin and the other's end.[32]

In *Bennett v. McPhatter*,[33] the court of appeals examined the concepts of constructive and actual knowledge and actions for defective construction within the framework of landlords and tenants.[34] To summarize the facts, Angela McPhatter was injured in March 2014 after falling through a broken board on the back deck of the house Brenda Daughtry was renting from the owner, James A. Bennett. McPhatter was

24. *Id.* at 699, 859 S.E. 2d at 852.

25. *Id.* at 703, 859 S.E.2d at 855.

26. *Doxey I*, 355 Ga. App. at 891, 846 S.E.2d at 168.

27. *Doxey II*, 359 Ga. App. at 702, 859 S.E.2d at 854.

28. *Id.* at 701, 859 S.E.2d at 853.

29. *Id.*

30. *Id.* at 702–03, 859 S.E.2d at 854.

31. *Id.* at 703, 859 S.E.2d at 855.

32. *See* Bennett v. McPhatter, 359 Ga. App. 804, 860 S.E.2d 105 (2021); *see also* Efficiency Lodge, Inc. v. Neason, 363 Ga. App. 19, 870 S.E.2d 549 (2022).

33. *Bennett*, 359 Ga. App. at 804, 860 S.E.2d at 105.

34. *Id.* at 804, 860 S.E.2d at 106.

a guest of the tenant, Daughtry. Following the injury, McPhatter brought a negligence and premises liability suit against both Daughtry, the tenant, and Bennett, the owner. Bennett filed a motion for summary judgment, which was denied by the Chatham County Superior Court. Bennett filed an interlocutory appeal, arguing that as an out-of-possession landlord, he had no liability to McPhatter for the injuries she sustained. On appeal, Bennett asserted that because he had no knowledge of the deck's alleged defective condition, he had no duty to inspect or repair the deck. Furthermore, Bennett argued that he was not liable for the deck's defective construction. Agreeing with Bennett, the Georgia Court of Appeals reversed the trial court's ruling, holding that summary judgment in favor of the landlord—at least in this instance—was appropriate.[35]

To triumph on a motion for summary judgment, the moving party must show that no genuine issue of material fact exists, and furthermore that those undisputed facts—when viewed in the light most favorable to the non-moving party—demand justice as a matter of law.[36] The court addressed each of Bennett's arguments in turn, focusing first on Bennett's contention that he had no liability because he was unaware of the defect and then turning second to Bennett's liability, or lack thereof, for defective construction.[37]

The court began by citing the general rules applicable in the case, but tailored them to the parties and facts at issue.[38] In this instance, Bennett would be liable to McPhatter in tort for injuries resulting either (1) from Bennett's failure to mend the deck or (2) from the deck's faulty construction.[39] To be liable, Bennett must have had knowledge.[40] The court made clear that Bennett had no absolute duty to inspect the deck before leasing the home, especially when he had no cause to think an inspection was needed.[41] Bennett's testimony revealed (1) that he had not noticed a problem with the deck when he conducted a walk-through with Daughtry before renting the house to her, (2) that he had never had any prior complaints about the deck, and (3) that he was unaware of any defect or problem with the deck. Daughtry, the tenant, admitted that she had not informed Bennett of the board's weakened condition. So, the

35. *Id.* at 805, 860 S.E.2d at 106.

36. *Id.* at 805, 860 S.E.2d at 106–07 (citing In/Ex Sys., Inc. v. Masud, 352 Ga. App. 722, 723, 835 S.E.2d 799, 800–01 (2019)).

37. *Bennett*, 359 Ga. App. at 807–08, 860 S.E.2d at 108–09.

38. *Id.* at 807, 860 S.E.2d at 108.

39. *Id.*

40. *Id.*

41. *Id.*

record showed that Bennett had neither actual nor constructive knowledge of the deck's defect. McPhatter did not provide alternative evidence that Bennett knew—or should have known—about the state of the deck.[42]

Next, the court narrowed its focus to Bennett's potential liability for defective construction.[43] The court made clear that an out-of-possession landlord can be held liable only for structural defects discoverable during a prepurchase building inspection.[44] Put another way, landlords are not liable for a premise's latent defects just because the latent defect exists at the time of the lease.[45] The undisputed facts make clear that Bennett did not build, or direct someone else to build, the deck.[46] Accordingly, Bennett could only be held liable if the defect was discovered during an inspection.[47] McPhatter put forth no evidence to show Bennett knew about the deck's purported defective condition or that a prepurchase inspection would have shown the same.[48] Generally speaking, issues of negligence by a landlord are not decided on summary judgment.[49] However, the evidence in this case was such that Bennett was entitled "to judgment as a matter of law."[50]

Another landlord and tenant case, *Efficiency Lodge, Inc. v. Neason*,[51] scrutinized the relationship between Georgia's landlord-tenant laws and innkeeper laws.[52] In particular, this case looked at the type of relationship created by extended-stay motels and their long-term residents.[53]

At issue in this case was whether the DeKalb County Superior Court's order of a permanent injunction preventing Efficiency Lodge from evicting some long-term residents without first filing proper dispossessory actions against those same residents was proper.[54] In its appeal of the trial court order, Efficiency Lodge put forth that it was an "innkeeper," permitted to evict its residents without navigating formal

42. *Id.*
43. *Id.* at 807–08, 860 S.E.2d at 108.
44. *Id.*
45. *Id.* at 808, 860 S.E.2d at 108.
46. *Id.*
47. *Id.* at 808, 860 S.E.2d at 108–09.
48. *Id.* at 808, 860 S.E.2d at 109.
49. *Id.*
50. *Id.*
51. 363 Ga. App. at 19, 870 S.E.2d at 549.
52. *Id.* at 19, 870 S.E.2d at 552.
53. *Id.* at 21, 870 S.E.2d at 552–53.
54. *Id.* at 19, 870 S.E.2d at 552.

dispossessory proceedings.[55] To bolster its claim, Efficiency Lodge pointed to its contract, which set forth its innkeeper status.[56] Unpersuaded, the Georgia Court of Appeals pointed to an alternative part of the same contract, which outlined that residents would be responsible for expenses, including court costs and attorney's fees, in the event of an eviction.[57] The presence of language concerning an eviction tossed into question the status of Efficiency Lodge as an innkeeper because innkeepers may keep guests from entering and may remove property of nonpaying guests without court proceedings.[58]

In its opinion, the court of appeals set out to clarify the ambiguity.[59] The court of appeals laid out several factors influencing its holding requiring dispossessory proceedings for eviction.[60] To begin, the court cited "the general canon of contractual construction" that in cases of ambiguity, the contract will be construed against the drafter.[61] Moreover, specific language trumps any general language to the contrary.[62] So, the presence of eviction language trumps the language in the contract alluding to an innkeeper-guest relationship.[63]

Next, the court looked to the language of the agreement on the whole to try and pinpoint the parties' intent.[64] In assessing the contract in full, the court reasoned that although the Efficiency Lodge did in fact offer short-term rentals, the record also showed that Efficiency Lodge allowed people to stay for extended periods—thus rendering its self-characterization as a hotel less than accurate, at least as regarding the long-term residents.[65]

The court cited its prior holding in a 1953 case, *Garner v. La Marr*,[66] where week-to-week residents renting a furnished room were determined to be tenants, rather than guests.[67] Residents of the Efficiency Lodge had been residents for far longer than the plaintiffs in *Garner*.[68] In fact, one

55. *Id.*
56. *Id.* at 22, 870 S.E.2d at 553.
57. *Id.* at 23, 870 S.E.2d at 554.
58. *Id.* at 23–24, 870 S.E.2d at 554.
59. *Id.* at 24, 870 S.E.2d at 554.
60. *Id.* at 23–29, 870 S.E.2d at 554–57.
61. *Id.* at 24, 870 S.E.2d at 554.
62. *Id.*
63. *Id.* at 24, 870 S.E.2d at 554–55.
64. *Id.* at 24, 870 S.E.2d at 555.
65. *Id.* at 26, 870 S.E.2d at 555–56.
66. 88 Ga. App. 364, 76 S.E.2d 721 (1953).
67. *Efficiency Lodge*, 363 Ga. App. at 26, 870 S.E.2d at 556 (citing *Garner*, 88 Ga. App. at 365, 76 S.E.2d at 723–24).
68. *Efficiency Lodge*, 363 Ga. App. at 26, 870 S.E.2d at 556.

resident of Efficiency Lodge had been there for five years![69] One plaintiff received mail at the Efficiency Lodge and reflected its address on his driver's license.[70] Another paid a security deposit at the Efficiency Lodge, and the school bus picked up her children on the street in front of the Efficiency Lodge.[71] Housekeeping did not service two of the plaintiffs' rooms, and no linen service was provided.[72] The court of appeals combined all of those facts to reach the conclusion that the Efficiency Lodge was not treating the plaintiffs as "transient guests" as would be understood by a "reasonably common person."[73] Therefore, the court of appeals held that the trial court was correct in ruling that to free itself of the plaintiffs, Efficiency Lodge was required to initiate dispossessory proceedings in the court.[74]

The court of appeals went on to clarify that even if the contract had been unambiguous, the provision to define the relationship of the parties—to the extent that it allowed the Efficiency Lodge to avoid eviction through dispossessory proceedings—would be unenforceable.[75] Georgia law specifically prevents tenants from waiving certain rights afforded to them by law.[76] Contractual language purporting to waive these certain tenant rights is void as a matter of law.[77] The plaintiffs, residents in the Efficiency Lodge, were using their rooms as their permanent dwelling places, and the facts show that Efficiency Lodge (1) contemplated the permanent use of these rooms as a dwelling place, (2) knew about the plaintiffs' use of the rooms as a permanent dwelling place, and (3) furthermore consented to the plaintiffs using the rooms as a permanent dwelling place.[78] Efficiency Lodge's attempt to use the contractual language to define the relationship as one of "innkeeper" and "guest" to avoid having to go through formal dispossessory proceedings thus falls flat because it is a violation of Official Annotated Code of Georgia section 44-7-2(b)(4).[79]

In affirming the trial court's order for an injunction, however, the court of appeals noted that Efficiency Lodge is not without a solution to

69. *Id.*
70. *Id.*
71. *Id.* at 27, 870 S.E.2d at 556.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 27, 870 S.E.2d at 556–57.
79. *Id.* at 27–28, 870 S.E.2d at 557; *see* O.C.G.A § 44-7-2(b)(4) (2022).

its problem.[80] The court concluded its opinion by noting that Efficiency Lodge may avail itself of the formal dispossessory proceedings to "remove any tenants whose occupancies have terminated."[81]

Next, in *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*,[82] the Georgia Court of Appeals further clarified the distinctions between an estate for years and a usufruct.[83] This case has been up the appellate ladder before—having made its way to the Supreme Court of Georgia in 2019.[84] The underlying facts of the case show that Atlanta Botanical Garden, Inc. is a private, nonprofit corporation operating a botanical garden on property leased to it by the City of Atlanta for a term of fifty years.[85] A member of GeorgiaCarry, Phillip Evans, visited the botanical gardens twice in 2014, both times openly carrying a handgun in a waistband holster. While unbothered on his first visit, on his second visit, an employee of the botanical garden stopped Evans and informed him that only police officers were allowed to have weapons on the property. Eventually, during that second visit, Evans was detained by a security officer and was later escorted from the property by an Atlanta Police Department officer.[86]

Omitting some of the prior procedural history and turning to the issue before the court of appeals in this case, the question at hand was whether Atlanta Botanical Garden was the holder of an estate for years or whether the terms of the lease conveyed only a usufruct.[87] The distinction is a critical one because an estate for years grants "private property" status under O.C.G.A. § 16-11-127(c)[88] and thus the ability to exclude or remove those in possession of a gun from the premises.[89] By contrast, a usufruct interest is a lesser interest where a party accepts the grantor's grant of the right to simply possess and enjoy the use of real estate, either at the grantor's will or for a fixed time.[90]

The court of appeals affirmed the Fulton County Superior Court and

80. *Efficiency Lodge*, 363 Ga. App. at 29, 870 S.E.2d. at 557.

81. *Id*.

82. 362 Ga. App. 413, 868 S.E.2d 802 (2022) (hereinafter *GeorgiaCarry I*).

83. *Id*.

84. *Id*. at 415, 868 S.E.2d at 803-04; GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 306 Ga. 829, 834 S.E.2d 27 (2019) (hereinafter *GeorgiaCarry II*).

85. *GeorgiaCarry I*, 362 Ga. App. at 414, 868 S.E.2d at 803.

86. *Id*. at 415, 868 S.E.2d. at 803.

87. *Id*. at 416, 868 S.E.2d at 804.

88. O.C.G.A. § 16-11-127(c) (2022).

89. *GeorgiaCarry I*, 362 Ga. App. at 415–16, 868 S.E.2d at 804; *see* O.C.G.A § 16-11-127(c).

90. *GeorgiaCarry I*, 362 Ga. App. at 416, 868 S.E.2d at 804 (citing O.C.G.A. § 44-7-1(a) (2022)).

held that the botanical garden indeed held an estate for years and that accordingly, the property was to be treated as "private property" under O.C.G.A. § 16-11-127(c).[91] Guiding its ruling were several factors. First, the court explained that whether something creates an estate for years or merely a usufruct depends on the parties' intentions.[92] A lease of more than five years is presumed to be an estate for years.[93] In this case, the lease term in question was for fifty years, which created a rebuttable presumption of an estate for years.[94] To overcome the rebuttable presumption of an estate for years, and show only the existence of a usufruct, lease terms would need to show the intent to create only a usufruct.[95]

Along with the fifty year term, the court of appeals pointed to the language in the lease creating a "leasehold estate," rather than a license or a usufruct, which is a form of license.[96] Moreover, the court cited the language in the lease indicating that the City of Atlanta held "fee simple title" to the land and had "delivered" the property to the garden "free and clear."[97] The lease granted to the garden the exclusive enjoyment, possession, and control of the property and also gave the garden the ability to "exclude any objectionable person" from the garden to the extent permissible under the law.[98] The court of appeals went on to suggest that the lack of "extremely burdensome restriction[s]" in the lease points to the existence of an estate for years and not a usufruct.[99]

91. *GeorgiaCarry I*, 362 Ga. App. at 413–14, 868 S.E.2d at 803.
92. *Id.* at 416, 868 S.E.2d at 804.
93. *Id.*
94. *Id.* at 416, 868 S.E.2d at 805.
95. *Id.*
96. *Id.* at 417, 868 S.E.2d at 805.
97. *Id.*
98. *Id.*
99. *Id.* at 418, 868 S.E.2d at 806.