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Advanced Foreclosure Issues in Georgia

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Throughout the recent economic downturn, Georgia has consistently had one of the highest foreclosure rates of any state in the country.[2] In November 2014, one in every 1,025 housing units in Georgia was foreclosed.[3] In the metro-Atlanta area, the statistics are slightly better than the state average: Fulton County saw one in every 1,184 housing units foreclosed;[4] Gwinnett County saw one in every 1,215;[5] and Dekalb County saw 1 in every 951 housing units foreclosed.[6] Georgia's more rural counties are still suffering the most, with 1 in every 425 housing units in Butts County being subjected to foreclosure.[7]

While the recession cycle is ending, Georgia has shown that there is still a substantial volume of foreclosures to work their way through the pipeline. This phenomenon makes a deep dive into the mechanisms and pitfalls involved in the foreclosure process imperative for lawyers for both debtors and creditors alike. This paper will address practical aspects of foreclosure practice from both sides of the process,

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[2] See J. Scott Trubey, *Foreclosure Rates Fall, Ga. Still 4th in U.S.*, Atlanta Journal-Constitution, January 17, 2013 at http://www.ajc.com/news/business/foreclosure-rates-fall-ga-still-4th-in-us/nTy38/; see also Corelogic, *National Foreclosure Report January 2014* at http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-january-2014.pdf.

[3] http://www.realtytrac.com/statsandtrends/foreclosuretrends/ga

[4] http://www.realtytrac.com/statsandtrends/foreclosuretrends/ga/fulton-county

[5] http://www.realtytrac.com/statsandtrends/foreclosuretrends/ga/gwinnett-county

[6] http://www.realtytrac.com/statsandtrends/foreclosuretrends/ga/dekalb-county

[7] http://www.realtytrac.com/statsandtrends/foreclosuretrends/ga/butts-county

including loss mitigation solutions, potential pitfalls in the foreclosure and confirmation process, priority disputes, bankruptcy, and post-foreclosure issues.

I. Loss Mitigation Solutions

There are three main methods for a lender and a troubled debtor to attempt to settle the debt between them without resorting to the often thorny foreclosure process: a deed in lieu of foreclosure, short sale, and a mutual departure from the loan terms. Each of these possible solutions has potential upsides, but also drawbacks and pitfalls that an attorney must consider.

A. Deed in Lieu of Foreclosure

One option for a troubled debtor is to simply transfer title to the burdened property to the lender in exchange for a cancelation of the note and security deed between the parties. This arrangement can be advantageous to a lender who can then obtain title to a property without going through the foreclosure process, but it is not suitable for some situations. Additionally, there are still potential issues for each party to consider.

1. Drawbacks for borrower

Tax law is outside the scope of this paper, but you should be aware that any amount that could be viewed as debt forgiveness to the debtor in a deed in lieu transaction is traditionally treated as taxable income. Federally, the Mortgage Forgiveness Debt Relief Act of 2007 will protect a debtor if the original loan was used to purchase or substantially improve a primary residence.[8] The Act's protections expired on December 31, 2014, however, and have not yet been extended for 2015.

2. Drawbacks for lender

Unlike in a foreclosure sale, a deed in lieu of foreclosure does not wipe out junior liens. Additionally, if the deed in lieu is not well drafted, the doctrine of merger[9] will extinguish the lender's first-priority lien and elevate all junior liens. Therefore, a lender is unlikely to (and depending upon the amount and size of junior liens, should not) accept

[8] Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 26 U.S.C § 108

[9] O.C.G.A. § 44-6-2 ("If two estates in the same property shall unite in the same person in his individual capacity, the lesser estate shall be merged into the greater.").

a deed in lieu of a foreclosure sale if the property is burdened by other liens. The merger doctrine can be avoided by inclusion of a clause that the parties do not intend for it to apply.[10] Unfortunately for the parties, however, no amount of well-drafted deed in lieu language will extinguish junior liens.

B. Short Sale

Though Georgia has no statutory definition for a short sale, it generally can be said to occur when the borrower obtains permission from the lender to sell secured property for less than the amount of the loan on the property. In other words, the lender agrees to waive the due on sale clause of the security deed and release its lien on the property even without full satisfaction of the debt. The advantages of a short sale for a buyer are obvious, particularly considering how much property has not yet rebounded to its pre-recession value. Depending on the difference between the short sale offer and the amount of principal remaining, a bank may decide that cutting its losses and taking less than the full debt would be easier in the long run, saving time and attorneys' fees to chase an ultimately unrecoverable deficiency.

A short sale can present drawbacks for the borrower. Along with the same tax concerns noted above, in Georgia, a lender is not required to confirm a sale of a property after a short sale. Georgia courts have noted that the confirmation statute[11] (which will be discussed in greater detail below) applies only to properties sold via the foreclosure process.[12] Therefore, a debtor who is looking to extinguish a debt via a short sale should ensure that a provision waiving the lender's right to recover a deficiency is contained within an agreement between the debtor and the lender.

[10] Fraser v. Martin, 195 Ga. 683, 687 (1943) ("One of the exceptions is that the lesser is not merged in the greater when it appears that the person in whom the two estates meet intends that it shall not take place . . . . The doctrine of merger of estates is designed primarily for the benefit of one who acquires an interest in property greater than he possessed in the first instance, and will not be held to apply, against his will, to his disadvantage.")

[11] O.C.G.A. § 44-14-161.

[12] Ashburn Bank v. Reinhardt, 183 Ga. App. 292, 293 (1987).

C. Mutual departure from loan terms

A lender may agree expressly or by conduct to different payment terms than are in the loan documents. Importantly, if the parties do mutually depart from the contract's terms, then the lender cannot use any insufficient or late payment to declare a default unless it gives the debtor notice that it intends to seek strict compliance with the documents and an opportunity to cure.[13] Generally, any such departure "must be mutual and intended, such that the parties have essentially a new agreement concerning the requirements of the original contract."[14] For our context, however, a fact issue can generally be created simply if the lender repeatedly accepts late or irregular payments.[15]

Importantly, a mutual departure will only prevent a lender from relying upon the specific default that its conduct has waived. For instance, in Shalom Farms, Inc. v. Columbus Bank & Trust Company,[16] the loan documents called for several monthly interest payments and a balloon principal payment at the end of the loan term. The debtor never made any of the interest or principal payments. In the subsequent note suit, the debtor argued that the lender had agreed to evaluate monthly whether the debtor could make the interest payments. In the event debtor could not pay, the lender agreed to extend the payment due date.[17] The Court of Appeals found that even if this were true, the creditor would still have been permitted to bring the action on the overdue principal amount, which the debtor never argued the lender had agreed to extend or waive.[18]

[13] O.C.G.A. § 13-4-4. See also Williams v. Sessions, 171 Ga. App. 662, 664 (1984) ("Hence, the trial court, sitting as trier of fact, was authorized to hold that no default had occurred based upon its findings that plaintiffs had established a practice of accepting late payments in the past and then declared a default without granting 'reasonable notice' of its intention to rely on the strict terms of the note.").

[14] Duncan v. Lagunas, 253 Ga. 61, 62 (1984).

[15] Lewis v. Citizens & S. Nat. Bank, 174 Ga. App. 847, 847 (1985).

[16] 169 Ga. App. 145 (1983).

[17] Id. at 145-46.

[18] Id. at 146-47.

II. Pitfalls in Foreclosure Procedures

Most foreclosure sales in Georgia are performed non-judicially by the foreclosing creditor. Though proceeding outside the judicial process, a creditor seeking to non-judicially foreclose on property still must adhere to certain statutory and contractual requirements or risk having the sale set aside. Additionally, if a creditor desires to recover a post-sale deficiency from the debtor or guarantors,[19] the creditor must confirm the non-judicial foreclosure sale, which can expose a creditor to additional risk if care is not taken to ensure the sale complies with Georgia's statutory requirements.

A. Georgia law requires that security deeds contain specific language before a lender can conduct a non-judicial foreclosure sale.

In order to conduct a non-judicial foreclosure sale, the operative security deed must affirmatively include power of sale language.[20] This is because the power to conduct a non-judicial foreclosure sale is not provided for in the Georgia code. The right to conduct a non-judicial foreclosure is a remedy created solely by contract, "intended to substitute the remedy by law, should the creditor see fit to avail itself of the power conferred upon [it] by [the] debtor."[21]

Additionally, any power of sale language within a deed "shall be strictly construed and shall be fairly exercised."[22] A court must construe a security deed according to its plain language, and where the meaning of the language is clear, a court

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[19] The requirement that a creditor confirm a foreclosure sale prior to seeking a deficiency against a guarantor is contingent upon whether the guarantor waived the protections of O.C.G.A. § 44-14-161 in the guaranty contract itself, and whether that waiver is sufficient under Georgia law. See Cmty. & S. Bank v. DCB Investments, LLC, 328 Ga. App. 605 (2014); HWA Properties, Inc. v. Cmty. & S. Bank, 322 Ga. App. 877 (2013).

[20] Hodgson v. Whitworth, 153 Ga. App. 783, 787 (1980).

[21] Moseley v. Rambo, 106 Ga. 597, 32 S.E. 638, 639 (1899) (emphasis added); See also You v. JP Morgan Chase Bank, 293 Ga. 67 (2013); Alliance Partners v. Harris Trust & Savings Bank, 255 Ga. 514, 515 (1996); Kennedy v. Gwinnett Commercial Bank, 155 Ga. App. 327, 328 (1980); Sale City Peanut & Milling Co. v. Planters & Citizens Bank, 197 Ga. App. 463, 464-65 (1963).

[22] O.C.G.A. ¶ 23-2-114.

cannot extend that meaning through judicial interpretation.[23] Indeed, no construction or interpretation by the court is permissible where the language of the contract is plain, unambiguous, and capable of only one interpretation.[24] Therefore, a court may not read a power of sale into an instrument that does not have one.[25]

For example, in Cohen v. Community Bank of the South, a bank sued guarantors of a note evidencing a loan secured by real property.[26] The guarantors argued the bank should have mitigated its damages by conducting a non-judicial foreclosure sale before resorting to suing the guarantors on the debt.[27] The Court of Appeals rejected the mitigation defense because the lender could not have elected foreclosure even had it wanted to do so. The note that formed the basis of the suit contained no power of sale language granting the bank any authority to conduct a non-judicial foreclosure, and the Court of Appeals found it could not read power of sale language into a note that did not otherwise provide the power.[28]

A power of sale clause must be strictly construed and courts will enforce the clause as written.[29] Therefore, even if the debtor is in default under a provision of the loan documents or another agreement between the creditor and debtor, the default will not authorize the lender to conduct a non-judicial foreclosure sale unless the power of sale expressly says so. For instance, in Andrews v. Holloway,[30] a landowner sued to set aside a non-judicial foreclosure. The original debtor subsequently transferred the foreclosed

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[23] Benton v. Patel, 257 Ga. 669, 672 (1987).

[24] Benefield v. Malone, 112 Ga. App. 408, 410 (1965).

[25] Cohen v. Community Bank of the South, 301 Ga. App. 209, 209-10 (2009).

[26] 301 Ga. App. 209 (2009).

[27] Id.

[28] Id. at 109-210.

[29] O.C.G.A. § 23-2-114; Matter of Green Rivers Forest, Inc., 200 B.R. 956, 960 (M.D. Ga. 1996); You v. JPMorgan Chase Bank, 293 Ga. 67 (2013); Cordele Banking Co. v. Powers, 217 Ga. 616, 619-20 (1962); Miron Motel, Inc. v. Smith, 211 Ga. 864, 855 (1955); Etheridge v. Boroughs, 209 Ga. 634, 636-37 (1953); Cadwell v. Swift & Co., 174 Ga. 313, 313 (1932); Andrews v. Holloway, 140 Ga. App. 622, 623 (1976); Sale City Peanut & Milling Co. v. Planters & Citizens Bank, 197 Ga. App. 463, 464-65 (1963).

[30] 140 Ga. App. 622, 622 (1976).

land to a third party, which the defendant creditor argued supported the foreclosure because the loan documents forbade any transfer without its consent.[31] The Court of Appeals held that even if such consent were required, it would not have permitted exercise of the power of sale clause. The court noted that powers of sale must be strictly construed and enforced only as written, and the loan documents only permitted a non-judicial foreclosure sale for a payment default or failure to pay taxes or insurance.[32]

In addition to affirmative language granting the lender a power of sale, a security deed should specifically provide an acceleration clause permitting the creditor to accelerate the debt upon default.[33] For instance, in Kennedy v. Ayers,[34] the Supreme Court of Georgia found that deeds lacking debt acceleration did not permit the creditor to accelerate the debt and conduct a non-judicial foreclosure sale.[35] The loan documents must also authorize acceleration based upon the default at issue.

Additionally, the security deed must contain language authorizing the creditor to execute the deed under power on the debtor's behalf (i.e., as the debtor's attorney-in-fact). "When the deed is executed by another on behalf of the grantor, out of his immediate presence, there must be a written power of attorney authorizing the act."[36] Therefore, where a creditor conducts a non-judicial foreclosure sale and signs a deed under power, it does so "in its capacity as the debtor's attorney in fact."[37] Because that capacity is not a right granted by any statute, it must originate by grant in a deed, will, or other special recordable instrument.[38]

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[31] Id.

[32] Id.

[33] See Ga. Real Estate Finance and Foreclosure Law § 4.2 (citing Shellman v. Scott, R. M. Charlt. 380, 1 Ga. Rep. 252 (1833)).

[34] Id.

[35] Id.

[36] 2 Ga. Real Estate Law & Procedure § 19:50.

[37] Building Block Enterprises, LLC v. State Bank and Trust Co., 314 Ga. App. 147, 150 (2012).

[38] 2 Ga. Real Estate Law & Procedure § 19:50 fn. 1.

If a creditor intends to purchase the property for sale itself (i.e., a credit bid), it must make sure the language in the deed authorizes it to do so. A lender may only buy a property at its own non-judicial foreclosure sale if the security deed giving the lender the power to conduct the sale also expressly gives the lender the power to purchase the property.[39]

The wrongful exercise of a power of sale clause will lead to a court setting aside the sale as wrongful or refusing to confirm the sale. For instance, in Hodgson v. Whitworth,[40] the Court of Appeals set aside a non-judicial foreclosure sale where it found that the parties had struck out the power of sale clause in the security deeds under which the sale was conducted.[41] The court found the lack of a power of sale provision made it "clear" that there had been an illegal foreclosure.[42][43]

A discussion of the types of damages available to a prevailing plaintiff in a wrongful foreclosure suit is found below in Section II.B.4. For more on pitfalls in the confirmation process, see Section II.C.

B. Requirements for exercising a power of sale.

Parties to a security deed may agree on particular terms regarding time and manner of sale, but in the absence of such terms, the statutory provisions regarding time, place, and manner of judicial sales govern.[44] Additionally, a non-judicial sale must be conducted and advertised under the same statutory provisions as judicial sales.[45]

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[39] Miller Grading Contractors, Inc. v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 732 (1981); Griffin Builders v. Synovus Bank, 320 Ga. App. 307, 309-10 (2013).

[40] 153 Ga. App. 783 (1980)

[41] Id.

[42] Id. at 787.

[43] See also DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 448-49 (2008) (finding trial court erred in granting directed verdict to creditor on debtor's wrongful foreclosure claim where creditor foreclosed on land not subject to security deed between the parties).

[44] O.C.G.A. § 23-2-114.

[45] O.C.G.A. § 44-14-162.

1. The Advertisement

A creditor must advertise the impending sale once a week for four weeks in the same paper as sheriff's sales, which should be the county legal organ for each county in which a portion of the property is located.[46] Under statute, the advertisement must contain a full and complete description of the property being sold.[47] The property's address is not required, but if the address is included, it must be "clearly set out in bold type."[48]

Georgia law also states that if the defaulting debtor was not the original debtor but obtained the property and assumed the default mortgage, then the notice must also contain a recital of the chain of title into the defaulting debtor.[49] The statute mandates that the advertisement contain information showing transfer of the loan documents if the foreclosing creditor is not the original lender—but also says that failure to do so will not invalidate an "otherwise valid" sale.[50]

Along with the statutory requirements, Georgia courts have made numerous statements over the years regarding what is and is not sufficient language for a foreclosure sale advertisement.[51] Pindar suggests, based upon authority from Georgia cases, that the advertisement also must contain:

- The name of the grantor;
- The current property owner (if different from the grantor);
- The name of the party exercising the power of sale;

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[46] O.C.G.A. §§ 9-13-140, 9-13-141.

[47] O.C.G.A. § 9-13-140.

[48] O.C.G.A. § 44-14-162.

[49] Id.

[50] Id.

[51] See, e.g., Redwine v. Frizzell, 184 Ga. 230 (1937) ("Whether or not the mere act of advertising property for sale under power is without more a sufficient election to declare the debt due under the option to accelerate maturity, it is unnecessary that the advertisement should affirmatively recite the exercise of such option, where it does recite that the debt is past-due and that the sale will be had in accordance with the power of sale.") (internal citations omitted).

- The name, address, and telephone number of the person or entity who has the authority to negotiate or modify the loan terms;
- The fact of default;
- The time and place of the sale; and
- Any prior encumbrance to which the sale is subject.[52]

However, the Georgia Court of Appeals has also said that only a failure to include the information mandated by O.C.G.A. § 9-13-140(a) will render a foreclosure advertisement defective per se, and suggested that the sale should be upheld only if it is found that the missing or incorrect information affected the sale price or "chilled the bidding."[53] Recall that § 23-2-114 requires that a creditor exercise a power of sale "fairly," which gives a fact finder considerable leeway, so it would be prudent to err on the side on overinclusion rather than under.

2. The Mailed Notice

Georgia law also requires that the foreclosing creditor notify the debtor of an impending foreclosure sale via mailed noticed no later than thirty days before the sale.[54] The notice must contain the name, address, and phone number for the person or entity with authority to negotiate the loan terms.[55] It should be sent to the property address or another address that the debtor has provided to the creditor.[56] The notice must be sent via "registered or certified mail or statutory overnight delivery, return receipt requested."[57]

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[52] 3 Ga. Real Estate Law & Procedure § 21:81 (7th ed.).

[53] Se. Timberlands, Inc. v. Sec. Nat. Bank, 220 Ga. App. 359, 359 (1996) ("Because the advertisement was not defective per se, and because no evidence showed this alleged defect affected the selling price, we affirm the trial court's confirmation."); see also Dan Woodley Communities, Inc. v. Suntrust Bank, 310 Ga. App. 656 (2011).

[54] O.C.G.A. § 44-14-162.2(a).

[55] Id.

[56] Id.

[57] Id.

This section too will be strictly construed. For instance, in Peters v. CertusBank Nat. Association, the Court of Appeals found a notice improper where it was sent via regular mail instead of one of the statutorily dictated methods.[58]

Note that as of August 7, 2012, the notice requirement applies to any tract of land a creditor plans to sell, not just land used as the debtor's dwelling place.[59]

3. Consequences of an improper advertisement or notice

Typically, "[w]here a foreclosing creditor fails to comply with the statutory duty to provide notice of sale to the debtor in accordance with O.C.G.A. § 44–14–162 et seq., the debtor may either seek to set aside the foreclosure or sue for damages for the tort of wrongful foreclosure."[60] However, though courts say the advertisement and notice provisions are in derogation of common law and should be strictly construed,[61] other courts have been upheld sales with improper advertisements so long as the irregularity or deficiency does not "contribute to chilling the price on the sale of the property."[62] For instance, in Williams v. South Central Farm Credit, the Court of Appeals upheld an advertisement that it felt substantially complied with the notice and advertisement requirements, because it found error did not "confuse the bidding intentions of any potential bidder of sufficient mental capacity to enter a binding contract for the sale of the real property," so the debtor did not "show a chilling of the sale so that a fair market value bid was not obtained."[63]

The issue of regularity of the notice and advertisement is also relevant in the confirmation process. "Pursuant to O.C.G.A. § 44–14–161(c), the trial court is required

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[58] 329 Ga. App. 29, 32 (2014). But see TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443 (2010) (finding notice valid under statute where it contained name and contact information for the creditor's attorney but did not say the attorney could negotiate the loan's terms).

[59] Peters v. CertusBank Nat. Ass'n, 329 Ga. App. 29, 31 (2014).

[60] Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 559 (2008).

[61] Peters v. CertusBank Nat. Ass'n, 329 Ga. App. 29, 31 (2014) (refusing to find that a letter is in substantial compliance with notice provision, which requires strict compliance).

[62] Williams v. S. Cent. Farm Credit, ACA, 215 Ga. App. 740, 742 (1994).

[63] Id.

not only to determine whether the property sold brought its true market value but also to pass upon the legality of the notice, advertisement, and regularity of the sale. Thus, a trial court should not confirm a sale under power if there is no evidence that the debtor, within the meaning of O.C.G.A. § 44–14–162.1 [sic], was properly notified of the sale in accordance with the statutory requirements."[64]

4. Damages available if a sale is set aside as wrongful

In a straightforward wrongful foreclosure case, the debtor may choose to either have the sale set aside or sue for damages in the amount of "the full difference between the fair market value of the property at the time of the sale and the indebtedness to the seller if the fair market value exceeded the amount of the indebtedness."[65] Importantly, a debtor may not both set aside the sale and obtain money damages for the property value.[66]

Because wrongful foreclosure is a tort flowing from the lender's breach of its statutory duty to fairly exercise a power of sale,[67] Georgia courts have permitted other categories of damages flowing from the breach depending upon the circumstances of the case. In the past, courts have allowed damages for mental anguish,[68] though it is treated as an action for intentional infliction of emotional distress and therefore comes with a high burden of proof.[69] Lost wages are permitted where the debtor can testify with reasonable specificity as to the income lost as a result of the creditor's wrongful actions.[70]

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[64] TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443 (2010) (internal punctuation omitted).

[65] Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 559 (2008).

[66] Calhoun First Nat. Bank v. Dickens, 264 Ga. 285, 285 (1994).

[67] O.C.G.A. § 23-2-114.

[68] Blanton v. Duru, 247 Ga. App. 175, 178 (2000) ("In a wrongful foreclosure action, an injured party may seek damages for mental anguish in addition to cancellation of the foreclosure.")

[69] DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 449 (2008).

[70] Blanton, 247 Ga. App. at 178.

Additionally, punitive damages[71] and bad faith attorneys' fees[72] have been awarded by juries and upheld by the Court of Appeals.

C. Confirmation Pitfalls

Georgia's confirmation statute provides that a creditor may not obtain a deficiency judgment from a debtor or guarantors[73] unless a Superior Court judge confirms the non-judicial foreclosure sale within thirty days of the sale date.[74] This process ensures that banks do not sell a property for less than true market value before turning around to collect a "gross deficiency" from the debtors.[75] At a confirmation hearing, the judge will examine the legality of the notice and advertisement, the regularity of the sale, and whether the property brought its true market value.[76]

1. Possible outcomes of hearing

A confirmation hearing has three potential outcomes: 1) the court confirms the sale; 2) the court denies confirmation; or 3) the court denies confirmation but orders a resale. A resale is ordered upon a showing of good cause, which can sometimes be found simply because the property did not bring its true market value as of the foreclosure sale date.[77] However, a judge may also rule that the creditor's actions in conducting the foreclosure sale and seeking confirmation failed to show good cause for a resale.[78] The fact that a creditor relied upon its expert's appraisal in determining the value it paid at the sale does not mandate a finding of good cause justifying a resale.[79] Therefore, if you

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[71] Decatur Investments Co. v. McWilliams, 162 Ga. App. 181, 181 (1982).

[72] Hall v. Robinson, 165 Ga. App. 410, 411 (1983).

[73] See p. 4.

[74] O.C.G.A. § 44-14-161.

[75] O.C.G.A. § 44-14-161(a), (b); Dorsey V. Mancuso, 249 Ga. App. 259, 261 (2001)(citing Commercial Exchange Bank v. Johnson, 197 Ga. App. 529, 530 (10) (1990)).

[76] Yellow Creek Investments, LLC v. Multibank 2009-1 CRE Venture, LLC, No. A14A1093, 2014 WL 5859674, at *1 (Ga. Ct. App. Nov. 13, 2014).

[77] Homes of Tomorrow, Inc. v. Fed. Deposit Ins. Corp., 149 Ga. App. 321, 322 (1979).

[78] Eagle GA I SPE, LLC v. Atreus Communities of Fairburn, Inc., 319 Ga. App. 844 (2013) (upholding trial court's decision to set aside foreclosure sale and refuse to grant resale).

[79] Eagle GA, 319 Ga. App. at 849.

know your lender client intends to seek a deficiency from a creditor, take steps to ensure that your client pays a reasonable amount at the foreclosure sale in order to minimize the risk of a resale denial.

The best way to ensure that your lender client forecloses on the property for the property's true market value is to obtain a credible and defensible appraisal that supports the value. Both the lender and the attorney should take great care to review the appraiser's conclusion of value and challenge any appraiser or methodology that appears tenuous prior to ever relying on that appraisal for a foreclosure sale. Ultimately, the ability to confirm the sale will rise or fall with the appraiser's opinion and the appraiser should therefore be treated as any other testifying expert.

Additionally, many lenders build in a "cushion" between their appraiser's conclusion of value and the foreclosure price. Practically, this cushion often reduces the borrower's ability to rebut the foreclosure price with a higher appraisal. Lenders also often argue this cushion demonstrates good cause (or good faith) to warrant a resale in the event the judge refuses to confirm the sale.[80]

2. Avoiding the confirmation process altogether

Another way to minimize your client's risk, though it involves more cost up front, is to file suit directly on the loan documents themselves and obtain a judgment before foreclosing upon the secured property.[81] In this instance, the lender obtains a judgment in the full amount of the debt, and can then foreclose on the real property and apply the sale's proceeds against the damages. A post-judgment foreclosure is not subject to the confirmation process, and the avoidance of a confirmation action will save time and additional attorney's fees.[82] The mechanics of such a suit are outside the scope of this paper.

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[80] The author makes no admission that such a cushion is or should be evidence of good cause to warrant a resale.

[81] Taylor v. Thompson, 158 Ga. App. 671, 672 (1981) (finding no confirmation proceeding necessary where debtor obtained a note suit money judgment, foreclosed upon secured property, and then sought remainder of judgment from debtor and creditors).

[82] Id.

III. Priority Disputes

The rules regarding priority have some pitfalls that can trip up a practitioner, but generally can be avoided (except for those pesky property lax liens) if the security deed evidencing the debt is well drafted, properly executed, and timely recorded.

A. Security Deeds

Typically, Georgia's race-notice statute will give priority to security deeds and liens on land based upon which is recorded first in the proper county clerk's office—unless the creditor knows of a prior, unrecorded lien.[83] Though an unrecorded security deed will always be effective between the executing parties, it is not effective against a later creditor whose security deed or lien is recorded first, unless the later deed holder knew of the unrecorded lien.

Such knowledge can be imputed from the executor of the deed. For instance, in Casey v. Wachovia Bank, the Georgia Supreme Court upheld a jury verdict in favor a bank who argued its later-filed security deed was superior to the plaintiff's deed of gift.[84] The deed of gift was recorded six minutes prior to the security deed, but the deed of gift contained language showing that the executor of both deeds conveyed the deed of gift subject to the security deed, which would be effective against the plaintiff even if she herself did not know of the security deed.[85]

1. Purchase money security deeds

Purchase money security deeds often have special priority. Particularly, a purchase money deed will have priority over any other liens or deeds executed as part of the same general transaction, no matter which is executed or recorded first:

> A purchase money security deed or mortgage has priority over liens against the purchaser of the property who simultaneously executes a security deed or mortgage for the purchase money . . . . [A] mortgage or deed to land, securing its purchase-money, and executed as a part of the

[83] O.C.G.A. §§ 44-2-1, 44-2-2.

[84] 273 Ga. 140, 140 (2000).

[85] Id.

same transaction in which the purchaser acquires title, will exclude or take precedence over any prior lien against the property arising through or against the purchaser. When the contracts are simultaneously made, so as to constitute one transaction, it makes no difference that the purchase-money mortgage may be made to a third person who advances the purchase-money at the time the purchaser receives his conveyance.[86]

2. Flaws in recorded deeds

There is statutory authority that an improperly attested deed is not deemed constructive notice.[87] However, Georgia courts have found that a facially valid recorded deed will have priority over later-filed deeds even if the first deed proves defective.[88] For instance, in Leeds Building Products, Inc. v. Sears Mortgage Corp., the Georgia Supreme Court stated that the latent defects in an improperly attested deed would not prevent the deed from providing constructive notice of its priority.[89]

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[86] Aetna Cas. & Sur. Co. v. Valdosta Fed. Sav. & Loan Ass'n, 175 Ga. App. 614, 617 (1985) (internal citations and punctuation omitted).

[87] O.C.G.A. § 44-14-39 ("A mortgage which is recorded in an improper office or without due attestation or probate or which is so defectively recorded as not to give notice to a prudent inquirer shall not be held to be notice to subsequent bona fide purchasers. A mere formal mistake in the record shall not vitiate it.").

[88] Leeds Bldg. Products, Inc. v. Sears Mortgage Corp., 267 Ga. 300 (1996).

[89] 267 Ga. 300, 301 (1996) ("Thus, we conclude that in the absence of fraud, a deed which, on its face, complies with all statutory requirements is entitled to be recorded, and once accepted and filed with the clerk of court for record, provides constructive notice to the world of its existence.")

3. Tax Liens

Tax liens have different priority depending upon the type of taxes at issue. Tax liens levied for delinquent taxes assessed on the property at issue are superior to all other liens on the property, including prior-recorded liens and security deeds.[90] Tax liens for income taxes, however, are effective only when filed in the county records and do not have priority over earlier-filed deeds and liens.[91]

4. Subrogation

Picture this: your client, a bank, pays off a first mortgage on a property and the timely recorded security deed evidencing that mortgage is cancelled. Your client then files its own security deed reflecting the debt the property owner now owes your client. The owner later defaults on your client's loan. Your client begins the foreclosure process, only to realize that it has lower priority than a lien executed after the mortgage your client paid off but recorded before your client's security deed. The lien holder is ecstatic, claiming it now has first right to the proceeds from your client's sale.

Enter the subrogation doctrine. As described by the Georgia Supreme Court in Davis v. Johnson:

> Where one advances money to pay off an encumbrance on realty either at the instance of the owner of the property or the holder of the encumbrance, either upon the express understanding or under circumstances under which an understanding will be implied that the advance made is to be secured by the senior lien on the property, in the event the new security is for any reason not a first lien on the property, the holder of the security, if not chargeable with culpable or inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equity of others would be prejudiced thereby; knowledge of the existence of an intervening encumbrance will not alone prevent the

[90] O.C.G.A. § 48-2-56(b).

[91] O.C.G.A. § 48-2-56(e). See also In re Tuggle, 30 B.R. 718, 719 (Bankr. N.D. Ga. 1983) (finding a security deed superior to tax lien assessed not on property that is the subject of the security deed).

> person advancing the money to pay off the senior encumbrance from claiming the right of subrogation where the exercise of such right will not in any substantial way prejudice the rights of the intervening encumbrancer; under the foregoing circumstances, equity will set aside a cancellation of such security and revive the same for the benefit of the party who paid it off.[92]

Under these circumstances, equity will set aside the cancelation of the first security deed and allow your client to proceed with the priority of that first deed, thus relegating the secondary lienholder back to junior status.[93]

B. Mortgages

Hopefully most attorneys preparing closing documents for Georgia creditors know to prepare a security deed instead of a mortgage. If, however, any of you must evaluate a mortgage document, keep in mind that it has slightly different priority rules than a security deed. Importantly, a mortgage, unless it was a purchase-money mortgage, is not superior to a year's support and lacks immunity from levy on materialmens' liens.[94] Additionally, a junior lien may be levied against a mortgage, and the mortgagor must resort to claiming sale proceeds in order to assert his priority.[95] Fortunately, mortgages are rare in Georgia.

C. Execution Liens

Generally, execution liens take priority according to the same principles as other instruments evidencing debt.[96] However, an attorney evaluating a priority dispute should note priority among judgment liens is determined based upon the court term from which any such liens issued, with no preference being given to the lien first levied upon.[97]

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[92] Davis v. Johnson, 241 Ga. 436, 438 (1978).

[93] Id. at 439.

[94] 2 Ga. Real Estate Law & Procedure § 20:37.

[95] Id.

[96] O.C.G.A. § 44-2-2(a).

[97] O.C.G.A. § 9-12-87.

D. Effects of Bankruptcy on Foreclosure

A mortgagor's declaration of bankruptcy has important implications for a mortgagee's ability to foreclose on property. Most significantly, once a mortgagor has filed a bankruptcy petition, all foreclosure efforts—including noticing a sale—generally are stayed pending outcome of the bankruptcy proceedings.[98] In addition, where the mortgagor's debt is discharged in bankruptcy, a mortgagee is barred from recovering a deficiency judgment against the mortgagor, although it may still foreclose on the property.[99]

1. Recovering "actual damages" for a willful violation of an automatic stay.

11 U.S.C. § 362(k) authorizes a debtor to recover "actual damages" when a lender willfully violates an automatic stay. In Lodge v. Kondaur Capital Corporation[100] the Eleventh Circuit found for the first time that emotional damages constitute "actual damages" pursuant to 11 U.S.C. § 362(k)[101] that are recoverable for a creditor's willful violation of an automatic stay.[102] In addition, the court clarified the standard for when an award of such damages is appropriate.[103] Specifically, in Lodge, a bankruptcy debtor brought an action against the assignee of a promissory note and security deed on the debtor's home, alleging, among other things, that the lender violated the automatic stay imposed during his bankruptcy proceedings.[104] Although the debtor suffered no

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[98] *See* 11 U.S.C. § 362; Babololay v. HSBC Bank USA, N.A., 324 Ga. App. 750 (2013). In all cases, an automatic stay goes into effect unless the action qualifies for an exception pursuant to 11 U.S.C. § 362(b) or a party is granted relief from the stay pursuant to 11 U.S.C. § 362(d).

[99] See Cassas-Rodriguez v. Cosmopolitan on Lindbergh Condominium Association, Inc., 325 Ga. App. 253 (2013) (discharge in bankruptcy voids any judgment to the extent that same is a determination of the personal liability of the debtor; however, because bankruptcy discharge does not affect liability in rem, liens on property remain enforceable).

[100] 750 F.3d 1263 (11th Cir. 2014),

[101] 11 U.S.C. § 362(K) provides that an "individual injured by any willful violation of a stay [pursuant to 11 U.S.C. § 362] shall recover actual damages."

[102] Id. at 1271.

[103] Id.

[104] Id. at 1265-66.

monetary damages as a result of the violation, he claimed he suffered emotional damages, arguing that these constituted "actual damages" within the meaning of § 362(k).[105]

The debtor's claim arose after the creditor published notice of sale of the debtor's property during the debtor's bankruptcy proceedings, but subsequently cancelled same.[106] The debtor never saw the publication, but instead learned of the notice when attorneys sent him letters notifying him that the property was about to be foreclosed.[107] Soon after, the debtor was notified that the sale was cancelled.[108] The debtor submitted evidence of his emotional damages showing that prior to the cancellation he was stressed out, unable to sleep, and suffered increased acid reflux, among other things.[109]

After reviewing precedent from its sister circuits, the Eleventh Circuit found that while emotional damages are recoverable as "actual damages" pursuant to 11 U.S.C. § 362(k), to recover such damages a plaintiff must: (1) "suffer significant emotional distress; (2) clearly establish the significant emotional distress; and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay."[110] Furthermore, the mere fact that a violation is "willful," standing alone, is insufficient to warrant emotional damages.[111] In the case at hand, the court went on to find that the debtor had failed to show he suffered "significant" emotional distress because he only offered generalized evidence that he was stressed out, and any such anxiety occurred for a period of less than a month.[112]

2. Tolling of O.C.G.A. § 44-14-161(a) during an automatic stay.

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[105] Id. at 1266.

[106] Id. at 1265-66.

[107] Id.

[108] Id.

[109] Id. at 1266.

[110] Id. at 1271.

[111] Id.

[112] Id.

As a general rule, a lender must seek relief from the automatic stay both to foreclose on property and to seek a confirmation of the sale.[113] In other words, the bankruptcy stay tolls the period for seeking a confirmation pursuant to O.C.G.A. § 44-14-161(a). One recent case addressed this issue in a slightly different context: whether the confirmation period was tolled where a general discharge had been issued but an adversary complaint remained pending that alleged the note secured by the property was non-dischargeable debt.

In Mountain Valley Community Bank v. Freeman[114] the Middle District of Georgia ruled on the applicability of an automatic stay to the thirty-day period in which to seek confirmation of a sale as set out by O.C.G.A. § 44-14-161(a). In that case, the debtor had signed a note secured by property.[115] In obtaining the note, however, the debtor had provided financial statements for properties he did not, in fact, own.[116] The debtor subsequently filed for bankruptcy.[117] Soon after, the lender filed an adversary proceeding in the bankruptcy court seeking a determination that the debtor's note was non-dischargeable due to his false statements made in obtaining the note.[118] After the bankruptcy court issued a general discharge of the debtor's debt, the lender sought relief from the bankruptcy stay to foreclose on the property, which the court granted.[119] The lender subsequently foreclosed on the property but, in doing so, failed to confirm the sale as required by O.C.G.A. § 44-14-161.[120] Over a year later, the lender's adversary proceeding went to trial, at which point the bankruptcy court determined that because the lender had failed to seek a confirmation, there was no remaining debt to be deemed non-

[113] In re McDaniel, 2008 WL 6858458 (Bankr. M.D. Ga. May 15, 2008).

[114] 508 B.R. 247 (2014).

[115] Id. at 248-49.

[116] Id.

[117] Id.

[118] Id.

[119] Id.

[120] Id.

dischargable by the court.[121] Accordingly, the bankruptcy court determined the lender had no enforceable claim against the debtor and dismissed the adversary complaint.[122]

On appeal, the lender argued that the thirty day period to seek confirmation was tolled pursuant to 11 U.S.C. § 108(c), which provides that "if applicable non-bankruptcy law fixes a period of time for commencing an action in which a debtor is protected, that time is tolled until the later of: '(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of termination or expiration of the stay . . . with respect to such claim.'"[123] Accordingly, the lender urged, the bankruptcy stay tolled the confirmation period.[124] The court rejected this argument, finding that the stay was lifted upon the bankruptcy court's issuance of a general discharge, despite that the lender contended the deficiency on the note was non-dischargeable.[125] Therefore, the court explained, no stay was in place when the lender foreclosed and the thirty day period in which to seek confirmation started running after foreclosure.[126]

3. Issues arising with frequent bankruptcy filers.

Recently, the Northern District of Georgia addressed the issue of the validity of foreclosure proceedings that occur during a stay where a debtor is a frequent bankruptcy filer. In Abernathy, LLC v. Smith[127] the lender attempted to foreclose on the debtor's property on two occasions. Each time, the debtor filed for bankruptcy the day before the sale.[128] In the first filing, the bankruptcy court dismissed the debtor's petition.[129] The second petition was also dismissed.[130] However, prior to dismissal but thirty days after the date of filing, the lender began foreclosure proceedings by sending a letter to the debtor notifying him of the sale.[131] After dismissal of the second bankruptcy petition, the lender conducted a sale and sold the property for greater than the value of the promissory

[121] Id. at 249-50.

[122] Id.

[123] Id. at 250 (quoting 11 U.S.C. § 108(c)).

[124] Id.

[125] Id.

[126] Id.

note.[132] When the debtor refused to accept the excess, arguing that the sale was invalid as a violation of the stay, the lender filed an action seeking declaration regarding the sale's validity.[133] Specifically, the lender urged that the stay was ineffective at the time it commenced proceedings pursuant to 11 U.S.C. § 362(c)(3), which provides:

> If a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)
>
> (A) The stay under [§ 362(a)] with respect to any action taken with respect to a debtor or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Because the debtor had refiled his bankruptcy petition within a year of his previous petition's dismissal, the lender contended it was entitled to commence foreclosure proceedings within thirty days of the date on which the debtor filed his second petition.[134] The court rejected this argument, siding with the majority of jurisdictions that hold that the statute only terminates the bankruptcy stay with respect to property owned by the debtor that is not part of the bankruptcy estate.[135] Accordingly, because the property at issue was part of the bankruptcy estate, the stay did not terminate within thirty days of the

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[127] No. 1:13-CV-03801, 2014 WL 4925654 (N.D. Ga. 2014).

[128] Id. at *1-2.

[129] Id.

[130] Id.

[131] Id.

[132] Id.

[133] Id.

[134] Id. at *3-4.

[135] Abernathy, at *4 (citing In re Jumpp, 356 B.R. 789, 791 n.3 (B.A.P. 1st Cir. 2006); In re Scott-Hood, 473 B.R. 133 (Bankr. W.D. Tex. 2012); In re Ajaka, 370 B.R. 426, 429 (Bankr. N.D. Ga. 2007)).

debtor's filing of the second petition, and the lender was not entitled to commence foreclosure proceedings prior to dismissal of the action.[136]

E. Post-Foreclosure Issues

1. Preservation of Property

After foreclosure but prior to removal of the debtor from the property, lenders may have concerns regarding preservation of the property's condition. In order to ensure protection against an angry holdover tenant, lenders may seek to preserve the property through a temporary restraining order or by appointment of a receiver.

For instance, in Alstep, Inc. v. State Bank and Trust Company[137] a commercial lender sought both a temporary restraining order and appointment of a receiver when an owner whose property had been foreclosed failed to vacate the premises. Specifically, after the lender filed a dispossessory action for the property, it also sought a temporary restraining order requiring the tenants to "immediately cease using or operating any of the collateral" on the property, which the trial court granted.[138] When the tenants failed to comply, the lenders then filed an emergency motion for appointment of a receiver.[139] The trial court granted and the lenders appealed.[140]

On appeal, the Georgia Supreme Court upheld the appointment of a receiver, explaining that "[a]ppointing a receiver under O.C.G.A. § 9-8-1 is justified where there is a danger that the assets at issue will be depleted or impaired if they remain in one party's control."[141] In addition, the court noted that "the decision as to whether the circumstances are sufficiently clear and urgent enough to warrant a receiver is committed to the trial court's discretion."[142] On this basis, the court upheld the appointment of the

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[136] Id. at *4.

[137] 293 Ga. 311 (2013).

[138] Alstep, at 312.

[139] Id.

[140] Id.

[141] Id. at 313 (citing Richardson v. Roland, 267 Ga. 32, 35 (1996)).

[142] Id.

receiver.[143] The court went on to note that appointment of a receiver was proper notwithstanding the fact that the lender did not confirm its sale pursuant to O.C.G.A. § 44-14-161(a). According to the court, the statutory text clearly provides that "the confirmation requirement applies to deficiency actions based solely on outstanding debt, not to actions that assert a contractual right under a promissory note."[144] Because the lender "sought to secure the additional collateral specified in its contract with [the debtor]"—mainly, personal property that was also included in collateral for the note—it was not required to seek confirmation before enforcing its right to recover that property.[145]

2. Liability for Homeowner's Dues, Taxes, Etc.

Prior to foreclosure, a homeowner remains liable for all homeowner's dues, taxes, and other costs associated with the property. Homeowner's associations may seek a lien on the property for unpaid dues.[146] "Although [a homeowner's association's] lien has priority over most other liens, it is subordinate to a first mortgage or a secondary purchase-money mortgage, 'provided that neither the grantee nor any successor grantee on the mortgage is the seller of the unit.'"[147] Furthermore, an association generally may hold a new owner liable for unpaid pre-conveyance assessments, it is barred from doing so "if the new owner acquired title as a result of the foreclosure of a first mortgage or a secondary purchase money mortgage, 'provided that neither the grantee nor any successor grantee on the secondary purchase-money mortgage is the seller of the unit.'"[148]

In regard to property taxes, a new property owner may be liable for past assessments after obtaining the property through foreclosure. Pursuant to O.C.G.A. § 48-5-9, the

[143] Id. at 314.

[144] Id. at 315 (citing Powers v. Wren, 198 Ga. 316, 321 (1944)).

[145] Id.

[146] See O.C.G.A. §§ 44-3-70 to 44-3-116 O.C.G.A. §§ 44-3-200 to 44-3-235.

[147] Dunhill Condominium Ass'n, Inc. v. Gregory, 228 Ga. App. 494, 495 (1997) (quoting O.C.G.A. § 44-3-109(a)(2), (4)).

[148] Id. (quoting O.C.G.A. § 44-3-80(e), (f)).

owner of real property is liable for ad valorem taxes, and resulting liability for a tax assessment follows the property to a successor in interest. This is true even if the conveyance occurs through foreclosure. Nevertheless, "'while a tax commissioner retains a lien on the property that is enforceable against a subsequent purchase of the property, the prior owner also remains liable for the taxes.'"[149]

3. Eviction Issues

Upon proper foreclosure of property, a debtor who remains in possession of the premises constitutes a tenant at sufferance and may be dispossessed of the property by the new property owner.[150] To the extent the tenant remains on the property, he or she is liable for its reasonable rental value.[151]

Georgia statutory law sets out specific requirements for dispossessing tenants at sufferance. In particular, pursuant to O.C.G.A. § 44-7-50, the owner must "demand the possession of the property." If the tenant refuses this demand, the owner may then go before a court and make an affidavit, which initiates dispossessory proceedings against the tenant.[152] The court then issues a summons to be served on the tenant requiring her to answer within seven days of service.[153] Where a tenant fails to answer, the court may

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[149] In re Jewel Rogers Waddy, No. 09-64634-WLH, 2010 WL 4881677, at *2 (N.D. Ga. Sep. 24, 2010) (quoting Mulligan v. Security Bank of Bibb County, 280 Ga. App. 248, 250 (2006)) (emphasis added); see also O.C.G.A. § 48-2-55; Jamestown Assocs. v. Fulton Cnty. Bd. Of Tax Assessors, 228 Ga. App. 360, 361 (1997) (prior property owner remains liable for ad valorem taxes until the date of transfer of title to the real property); Jones v. Morse Bros. Lumber Co., 171 Ga. 753 (1931) (owners liable for taxes assessed while title holder).

[150] West v. Veterans Administration, 182 Ga. App. 767, 768(1) (1987).

[151] Britton v. Federal Nat. Mortg. Ass'n, 307 Ga. App. 581, 582 (2011) (citing Bible v. Allday, 93 Ga. App. 231(2) (1956)).

[152] O.C.G.A. § 44-7-50.

[153] O.C.G.A. § 44-7-51. The statute provides that the summons and affidavit may be served through personal service or by posting copies on the door of the premises and mailing a copy to the defendant. O.C.G.A. § 44-7-51(c). If this latter method is used, the court may enter a default judgment for possession of the premises but is not authorized to enter a judgment for money owed. Id.

enter a default judgment for a writ of possession.[154] Otherwise, once a tenant answers the court holds a trial on the issues, during which time the tenant is allowed to remain in possession of the property.[155] If the court issues a writ of possession, the writ becomes effective after seven days of entry of the judgment, at which time the owner is then authorized to remove the tenant and her personal property.[156]

One recent case dealt with whether a post-foreclosure tenancy at sufferance can be converted to a tenancy at will. In Drury v. Security State Bank,[157] a lender-buyer brought a dispossessory action against hold over homeowners whose property had been foreclosed.[158] After the trial court entered a writ of possession, the debtors appealed, arguing, among other things, that their tenancy at sufferance had been converted to a tenancy at will in light of an alleged oral agreement between the debtor and the bank, and they were therefore entitled to remain in the property absent proper notice and a demand pursuant to O.C.G.A. § 44-7-7.[159] The court of appeals rejected this argument, citing evidence of the bank's numerous eviction letters to the debtors and the fact that the bank's president denied the existence of any oral agreement.[160] Accordingly, the court concluded that the debtors were subject to evidence absent the bank's compliance with the notice and demand provisions of O.C.G.A. § 44-7-7.

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[154] O.C.G.A. § 44-7-53(a).

[155] O.C.G.A. § 44-7-53(b). Pending the final outcome of the litigation, the tenant must pay rent into the registry of the court pursuant to O.C.G.A. § 44-7-54.

[156] O.C.G.A. § 44-7-55.

[157] 328 Ga. App. 39 (2014).

[158] Id. at 39.

[159] A tenant at will is entitled to sixty days' notice of termination pursuant to O.C.G.A. 44-7-7. Furthermore, the statute requires that the owner demand possession of the property following expiration of the notice period prior to instituting a dispossessory proceeding pursuant to O.C.G.A. § 44-7-50(a). Id. at 41 (citing Trumpet v. Brown, 215 Ga. App. 299, 300(2) (1994)).

[160] Id. at 43-44.

F. Conclusion

Foreclosures are alive and well in Georgia, and any practitioner must be proficient in both the procedure and pitfalls in order to effectively counsel clients in this area of the law. Whether your client is a creditor or a debtor, Georgia's non-judicial foreclosure process contains specific statutory requirements that all practitioners in this area of the law must strictly follow in order to avoid litigation.