

2015

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### Recommended Citation

Thompson, Zack S. (2015) "Providing Fair Relief in Georgia Dispossessory Proceedings," *Georgia State University Law Review*: Vol. 32: Iss. 4, Article 7.

Available at: <http://readingroom.law.gsu.edu/gsulr/vol32/iss4/7>

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## PROVIDING FAIR RELIEF IN GEORGIA DISPOSSESSORY PROCEEDINGS

Zack S. Thompson\*

### INTRODUCTION

In August 2014, Fulton County Superior Court granted the new owner of 477 Peachtree Street in downtown Atlanta the ability to begin evicting the tenant homeless shelter that had occupied the property for eighteen years.<sup>1</sup> The largest shelter space in the southeastern United States, the Peachtree-Pine shelter provided services to an average of 700 men, women, and children daily, with as many as 650 sleeping there each night.<sup>2</sup> The shelter contended that the shelter's new landlord had gained title improperly by—fraud and collusion among a number of other acts—purchasing a note attached to the property; working to cut off the shelter's private funding and thus its ability to pay its rent, bills, and loan; and subsequently purchasing the property at foreclosure.<sup>3</sup> Though the shelter stated valid claims for trial, claims such as wrongful foreclosure are not available defenses to a dispossessory proceeding.<sup>4</sup> For other reasons,

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\* J.D. Candidate, 2016, Georgia State University College of Law. Special thanks to the Hon. Craig Schwall, Rupal Romero, Professor Ryan Rowberry, and the Georgia State University Law Review.

1. Rhonda Cook, *Owners Can Begin Peachtree and Pine Shelter Eviction Process*, ATLANTA J. CONST. (Aug. 8, 2014, 9:01 PM), <http://www.ajc.com/news/news/owners-can-begin-peachtree-and-pine-shelter-evicti/ngyFd/>; *Mission & History*, METRO ATLANTA TASK FORCE FOR HOMELESS, <http://atlantataskforceforhomeless.org/our-mission-history/> (last visited Mar. 25, 2016) (“In November of 1996 our current facility, located on the corner of Peachtree and Pine Streets, was purchased by a generous donor and immediately deeded over to the Task Force.”).

2. Cook, *supra* note 1 (“As many as 650 men, women and children sleep at the shelter each night but there are far more when the weather is bad or it's cold.”); *Mission & History*, *supra* note 1 (“This 95,000 sq. ft. facility is the largest shelter space in the southeastern United States, providing shelter and services to an average of 500–700 men, women, and children on a daily basis.”).

3. Terry Carter, *Battle of Atlanta: Fight over a Downtown Homeless Shelter Strains Some Down-Home Ties*, ABA J. (May 1, 2011, 9:50 AM), [http://www.abajournal.com/magazine/article/battle\\_of\\_atlanta\\_fight\\_over\\_a\\_downtown\\_homeless\\_shelter\\_strains](http://www.abajournal.com/magazine/article/battle_of_atlanta_fight_over_a_downtown_homeless_shelter_strains); Cook, *supra* note 1. *See also* Special Master's Order on Defendants' Motions for Summary Judgment at 3–29, *Ichthus Cmty. Trust v. Metro Atlanta Task Force for the Homeless, Inc.*, Civil Action No. 2010-CV-185971 (Super. Ct. Fulton Cty. 2014).

4. Greg Land, *Judge Says Landlord May File to Evict Task Force Shelter*, FULTON COUNTY DAILY REPORT (Aug. 12, 2014), <http://www.dailyreportonline.com/id=1202666485342/Judge-Says-Landlord->

the Georgia Court of Appeals reversed the dispossessory ruling and effectuated a stay until the trial court resolved the issue of title.<sup>5</sup> However, the shelter's financial straits also affected its ability to pay rent pending adjudication.<sup>6</sup> The shelter was therefore unable to retain legal possession while adjudicating its claims.<sup>7</sup>

In contrast, Laura Westray, writing about the dangers of overly burdensome eviction requirements, describes Lena Schnuck, an eighty-nine-year-old owner of an eight-unit apartment building.<sup>8</sup> Lena, after suffering a stroke, was unable to evict a tenant without enduring "costly and time consuming court preparations" while waiting for the required trial.<sup>9</sup> In reality, heartless slumlords are rare; "the great majority of owners are merely attempting to earn a reasonable return on their investments by providing a vital service to our society."<sup>10</sup> Most landlords, like Lena, seek eviction in good faith.<sup>11</sup>

Summary eviction processes must provide a swift, narrow avenue through which property owners may evict tenants at sufferance without turning to self-help or a full civil suit.<sup>12</sup> However, such an

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May-File-to-Evict-Task-Force-Shelter?slreturn=20160209150040 (noting that on motions for summary judgment, "the court-appointed special master . . . dismissed the Task Force's racketeering and libel claims, but kept alive other claims, including those for tortious interference with the shelter's lenders and wrongful foreclosure").

5. Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC, 741 S.E.2d 225 (Ga. Ct. App. 2013). The case was again appealed and heard by the Georgia Supreme Court in 2015, but the court dismissed the dispossessory issue as moot because "the Task Force has successfully obtained a remedy at law for the dispossessory action . . ." Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Trust, 780 S.E.2d 311, 317 (Ga. 2015).

6. Greg Land, *Homeless Shelter Asks Judge to Reconsider Order on Rent*, FULTON COUNTY DAILY REPORT (Aug. 14, 2014), <http://www.dailyreportonline.com/id=1202666880558/Homeless-Shelter-Asks-Judge-to-Reconsider-Order-on-Rent> ("Since the Task Force is unable to pay any 'substantive rent,' [Task Force's attorney] wrote, it will inevitably be forced out . . .").

7. Land, *supra* note 4.

8. Laura L. Westray, Note, *Are Landlords Being Taken by the Good Cause Eviction Requirement?*, 62 S. CAL. L. REV. 321, 321 (1988).

9. *Id.* at 321-22.

10. Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 767 (1994) (quoting Laura L. Westray, Note, *Are Landlords Being Taken by the Good Cause Eviction Requirement?*, 62 S. CAL. L. REV. 321, 321 (1988)).

11. Lauren A. Lindsey, Comment, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws By Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 102 (2010).

12. Mary B. Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J.

action inherently struggles to provide parties with full legal redress, especially considering property's uniquely equitable attributes.<sup>13</sup> Georgia's dispossessory actions are no different, limiting both parties' range of options in the interest of providing a speedy alternative to self-help or other improper eviction procedures.<sup>14</sup>

This Note argues for a Georgia dispossessory action scheme that, when necessary, is both broader for defendants and quicker for plaintiffs. Part I examines the current state of dispossessory actions in Georgia.<sup>15</sup> Part II provides a critical analysis of Georgia's dispossessory action scheme, particularly regarding defendants' available defenses and rent requirements<sup>16</sup> and plaintiffs' access to timely remedies.<sup>17</sup> Finally, Part III proposes solutions that (1) better equip defendants to legitimately challenge dispossessory actions and (2) provide property owners with appropriately swifter remedies.<sup>18</sup>

## I. BACKGROUND

Tenancies at sufferance occur most often when a tenant or property owner does not vacate a property after losing possessory rights to the property by way of a terminated lease or foreclosure.<sup>19</sup> Summary

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MARSHALL L. REV. 407, 410 (2007). "Though details may differ, in general, the summary eviction proceeding is one that provides an alternative to the landlord's exercise of self-help by providing the landlord with a fast, effective way to regain possession of the premises after the tenant has breached a lease." *Id.*

13. *Id.* at 410–11 ("Despite the problems that restrictions on time and triable issues may pose for tenants, those restrictions are the basis for the view that the summary eviction proceeding is a convenient, safe, and relatively speedy alternative to self-help."); Gerchick, *supra* note 10, at 769 (discussing eviction's potential damage to tenants, including "many tenants for whom an eviction would result in homelessness, particularly among those that live in rent control or low-income housing and that would not be able to locate similarly priced housing upon eviction").

14. WILLIAM J. DAWKINS, GA. LANDLORD & TENANT: BREACH & REMEDIES § 5-1 (4th ed. 2007) ("Self-help evictions by landlords without resort to [dispossessory proceedings] . . . constitute actionable torts, even if the tenant is holding over . . . . Such forcible action by the landlord may amount to a trespass or other actionable tort for which damages, including punitive damages, may lie.").

15. See discussion *infra* Part I.

16. See discussion *infra* Part II.A.

17. See discussion *infra* Part II.B.

18. See discussion *infra* Part III.

19. Bellamy v. Fed. Deposit Ins. Corp., 512 S.E.2d 671, 675 (Ga. Ct. App. 1999) ("Where former owners of real property remain in possession after a foreclosure sale, they become tenants at sufferance."); 2 DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE WITH FORMS § 11:42 (7th ed. 2013) ("[A] tenant by sufferance is a wrong-doer who is in possession without

proceedings to obtain possession from a tenant at sufferance exist in all states.<sup>20</sup> States name these actions by a current property owner against a tenant at sufferance differently; labels include “summary process,” “summary dispossession,” and “forcible entry and detainer.”<sup>21</sup> Georgia denotes such actions with the term “dispossessory.”<sup>22</sup> Dispossessory actions nationwide provide property owners with streamlined title determination, often producing results more quickly than other adjudicative processes.<sup>23</sup> Georgia’s dispossessory proceeding is similarly streamlined compared to other civil proceedings.<sup>24</sup>

O.C.G.A. §§ 44-7-49 to -59 exclusively control dispossessory action procedure in Georgia.<sup>25</sup> Property owners seek, through dispossessory proceedings, a “writ of possession,” which the court may issue to give the property owner unconditioned and unrestricted possession of the property.<sup>26</sup> After initially demanding possession of the property from a tenant at sufferance, property owners may

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the landlord’s consent, although his original entry may have been lawful.”).

20. Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000) (“A summary proceeding for eviction exists in every state.”).

21. *Id.* (noting examples of summary proceedings’ “different labels-summary process, summary dispossession, or forcible entry and detainer”).

22. Howard v. GMAC Mortg., LLC, 739 S.E.2d 453, 454 (Ga. Ct. App. 2013) (“In this dispossessory *action* . . . GMAC filed a dispossessory *warrant* against Howard in Cherokee County State Court, asserting that he was a tenant at sufferance as a result of GMAC’s purchase of the property at a May, 2010 foreclosure sale.” (emphasis added)); Williams v. Clayton Park Mobile Home Court, Inc., 304 S.E.2d 483, 484 (Ga. Ct. App. 1983) (“On September 2, 1982, this dispossessory *proceeding* was instituted.” (emphasis added)).

23. O.C.G.A. § 44-7-53(b) (2010) (“Every effort should be made by the trial court to expedite a trial of the issues.”). This expedition parallels other states’ procedures. Spector, *supra* note 20, at 137 (“[A] basic feature of the proceeding is its limited nature. Generally only a single issue is presented: Who is entitled to possession? The question is usually answered within six to ten days after the action is commenced.”).

24. 1979 Ga. Op. Atty. Gen. U79-7 (1979) (“[A] dispossessory proceeding is not a civil action but [is] merely a summary process setting forth the procedure for the disposition of the property pending trial of any contested issues.”).

25. Ralls v. E.R. Taylor Auto Co., 42 S.E.2d 446, 447 (Ga. 1947). Summary proceedings provided in the Georgia code, currently O.C.G.A., Art. 3, Ch. 7, T. 44, are “the only lawful manner by which a tenant may be summarily and forcibly evicted.” *Id.* “Since a dispossessory proceeding is not a civil suit, [O.C.G.A. § 15-10-43] and the remaining provisions relative to the filing of a civil suit before a justice of the peace do not apply to dispossessory proceedings.” 1979 Ga. Op. Atty. Gen. U79-7 (1979).

26. O.C.G.A. § 44-7-49 (2010). “[W]rit of possession’ means a writ issued to recover the possession of land or other property and such writ shall not contain restrictions, responsibilities, or conditions upon the landlord in order to be placed in full possession of the land or other property.” *Id.*

immediately make an affidavit of the facts if the tenant at sufferance “refuses or fails to deliver possession when so demanded.”<sup>27</sup> A copy of a summons and the affidavit is then “personally served upon the defendant.”<sup>28</sup> Within seven days from the date of service, the defendant may answer with “any legal or equitable defense or counterclaim.”<sup>29</sup> The court may enter a default judgment if the defendant does not answer.<sup>30</sup> If the dispossessory action is for nonpayment of rent, a defendant’s tender of “all rents allegedly owed plus the cost of the dispossessory warrant” is a complete defense.<sup>31</sup> If the defendant does answer, a trial of the issues ensues.<sup>32</sup> If the property owner prevails, the court issues a writ of possession, “effective at the expiration of seven days after the date such judgment was entered,” that authorizes “the removal of the tenant or his or her personal property or both from the premises.”<sup>33</sup> If the

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27. O.C.G.A. § 44-7-50(a) (2010). “[A] proper demand for possession is a condition precedent to the right of a landlord to dispossess.” *Whipper v. Kirk*, 274 S.E.2d 662, 664 (Ga. Ct. App. 1980).

28. O.C.G.A. § 44-7-51(a) (2010). (“A copy of the summons and a copy of the affidavit shall be personally served upon the defendant.”)

29. O.C.G.A. § 44-7-51(b) (2010). “A tenant has an unqualified right to submit an answer and a counterclaim in all dispossessory proceedings.” *Moran v. Mid-State Homes, Inc.*, 320 S.E.2d 625, 626 (Ga. Ct. App. 1984).

30. O.C.G.A. § 44-7-51(c), -53(a) (2010). The default judgment may only grant a writ of possession, not money owed, for which the court may only grant judgment if “the defendant files an answer or other money makes an appearance in the case.” O.C.G.A. § 44-7-51(c).

31. O.C.G.A. § 44-7-52 (2010). However, “a landlord is required to accept such a tender from any individual tenant after the issuance of a dispossessory summons only once in any 12 month period.” *Id.*

32. O.C.G.A. § 44-7-53(b) (2010).

If the tenant answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil actions in courts of record except that if the action is tried in the magistrate court the trial shall be had in accordance with the procedures prescribed for that court.

*Id.*

33. O.C.G.A. § 44-7-55 (2010).

If, on the trial of the case, the judgment is against the tenant, judgment shall be entered against the tenant for all rents due and for any other claim relating to the dispute. The court shall issue a writ of possession, both of execution for the judgment amount and a writ to be effective at the expiration of seven days after the date such judgment was entered . . . . Any writ of possession issued pursuant to this article shall authorize the removal of the tenant or his or her personal property or both from the premises and permit the placement of such personal property on some portion of the landlord’s property or on other property as may be designated by the landlord and as may be approved by the executing officer; provided, however, that the landlord shall not be a bailee of such personal property and shall owe no duty to the tenant regarding such personal property. After execution of the writ, such property shall be regarded as abandoned.

tenant prevails, “he shall be entitled to remain in the premises and the landlord shall be liable for all foreseeable damages shown to have been caused by his wrongful conduct.”<sup>34</sup>

Georgia has established narrow avenues through which a tenant at sufferance may defend against a dispossessory action, particularly post-foreclosure.<sup>35</sup> In fact, Georgia courts have recognized only one appropriate rebuttal to dispossessory actions: a fundamental lack of landlord-tenant relationship.<sup>36</sup> A defendant may prove the lack of a landlord-tenant relationship by presenting fraudulent deeds or other evidence that the plaintiff does not actually own the property.<sup>37</sup> Georgia courts distinguish these challenges from those that attack the means by which the plaintiff obtained ownership of the property, such as wrongful foreclosure.<sup>38</sup> Defendants are left to address the

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*Id.*

34. O.C.G.A. § 44-7-55.

If the judgment is for the tenant, he shall be entitled to remain in the premises and the landlord shall be liable for all foreseeable damages shown to have been caused by his wrongful conduct. Any funds remaining in the registry of the court shall be distributed to the parties in accordance with the judgment of the court.

*Id.*

35. *E.g.*, Howard v. GMAC Mortg., LLC, 739 S.E.2d 453, 455 (Ga. Ct. App. 2013) (“[A]lleged invalidity of a foreclosure sale cannot be asserted as a defense in a subsequent dispossessory proceeding.”); Bellamy v. Fed. Deposit Ins. Corp., 512 S.E.2d 671, 674 (Ga. Ct. App. 1999) (“It is not germane to a dispossessory proceeding to allege ‘that a contract under which the plaintiff claims to derive title from the defendant is void and should be canceled.’” (quoting Womack v. Columbus Rentals, Inc., 478 S.E.2d 611, 614–15 (Ga. Ct. App. 1996))); McKinney v. S. Boston Savings Bank, 274 S.E.2d 34, 35 (Ga. Ct. App. 1980) (“The purchaser at a foreclosure sale . . . is the sole owner of the property until and unless the sale is set aside.”).

36. Egana v. HSBC Mortg. Corp., 669 S.E.2d 159, 161 (Ga. Ct. App. 2008). This case involved an allegedly fraudulent security deed. *Id.* The Georgia Court of Appeals distinguished between defendants challenging plaintiff’s ownership of the property—and therefore the landlord-tenant relationship itself—and defendants claiming defects in the landlord’s title. *Id.*

37. *E.g.*, Patrick v. Cobb, 49 S.E. 806 (Ga. 1905) (plaintiff allegedly did not present sufficient evidence to establish the existence of a tenancy); Egana, 669 S.E.2d at 160–61 (allegedly fraudulent security deed); Wilbanks v. Arthur, 570 S.E.2d 664 (Ga. Ct. App. 2002) (defendant’s mother allegedly acquired title from plaintiff through adverse possession, and defendant lived on the property with mother’s permission); Sanders v. Hughes, 359 S.E.2d 396 (Ga. Ct. App. 1987) (document between the parties was allegedly a sales contract, not a lease).

38. *E.g.*, Crawford v. Crawford, 77 S.E. 557 (Ga. 1913) (written contract under which the plaintiff claimed to derive title allegedly obtained by fraud, and therefore void); Sanders v. Daniel, 691 S.E.2d 244 (Ga. Ct. App. 2010) (landlord’s title allegedly invalid because the company from which he bought the property had obtained an order quieting title from a court lacking subject matter jurisdiction); Bellamy, 512 S.E.2d at 674 (foreclosure sale allegedly invalid due to failure of notice, failure to comply with the security deed exercise of power sale, and other defects).

latter in separate actions, although these counterclaims are still considered compulsory and carry the risk of claim preclusion.<sup>39</sup>

In short, a defendant may assert that a plaintiff *does* not own the property and may retain possession while adjudicating that issue.<sup>40</sup> However, defendants are left to assert that plaintiffs *should* not own the property in a separate action after losing possession of the property.<sup>41</sup> This dichotomy applies even where a counterclaim like wrongful foreclosure, if valid, would place the defendant in possession of the property and therefore abolish the defendant's status as a tenant at sufferance.<sup>42</sup>

Additionally, even when a defendant presents an appropriate defense, Georgia law requires that the defendant pay rent into the court registry pending resolution or automatically lose the dispossessory action and possession of the property.<sup>43</sup> Likewise,

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39. *Sanders*, 691 S.E.2d at 246 (“[W]hile [defendant is] free to challenge [plaintiff’s] title in a separate action, she could not raise the alleged defect as a defense to [plaintiff’s] dispossessory action.”); *Bellamy*, 512 S.E.2d at 674 (“[A]ny defect in the advertising of the foreclosure, conduct of sale, deed under power of sale, or other basis to set aside the foreclosure had to be asserted as a compulsory counterclaim or it becomes barred by res judicata.”); *Trust Co. Bank of Nw. Ga. v. Shaw*, 355 S.E.2d 99, 101 (Ga. Ct. App. 1987) (holding that res judicata barred a prior dispossessory defendant from instituting a tort action for damages stemming from landlord’s failure to maintain premises because the dispossessory proceeding satisfied res judicata’s “same transaction” test); *Moran v. Mid-State Homes, Inc.*, 320 S.E.2d 625, 626 (Ga. Ct. App. 1984) (holding that the trial court erred in dismissing a counterclaim where defendant lost the dispossessory claim because a “tenant has an unqualified right to submit an answer and a counterclaim in all dispossessory proceedings. Failure to pay rent into the registry of the court pursuant to O.C.G.A. § 44-7-54 affects only the right to possession of the premises, not the right to pursue a counterclaim.”).

40. *Thomas v. Wells Fargo Credit Corp.*, 409 S.E.2d 71, 72 (Ga. Ct. App. 1991) (“Defendants’ claim that they own the premises is relevant only to the extent that it challenges the allegations that plaintiff owns the premises and that defendants are tenants at sufferance, i.e., that plaintiff is a landlord with right of immediate possession.”).

41. *Womack v. Columbus Rentals, Inc.*, 478 S.E.2d 611, 614–15 (Ga. Ct. App. 1996).

The purchaser at a foreclosure sale under a power of sale in a security deed is the sole owner of the property until and unless the sale is set aside. It is not germane to a dispossessory proceeding to allege ‘that a contract under which the plaintiff claims to derive title from the defendant is void and should be canceled’ . . . . A tenant can not dispute the title of his landlord.

*Id.* (quoting *McKinney v. S. Boston Savings Bank*, 274 S.E.2d 34 (Ga. Ct. App. 1980)).

42. *Howard v. GMAC Mortg., LLC*, 739 S.E.2d 453, 455 (Ga. Ct. App. 2013) (holding that wrongful foreclosure is not a defense to a dispossessory proceeding); *Racette v. Bank of Am., N.A.*, 733 S.E.2d 457, 464–65 (Ga. Ct. App. 2012) (holding that equitable relief in the form of a foreclosure sale’s cancellation is an appropriate remedy for wrongful foreclosure).

43. O.C.G.A. § 44-7-54(a) (2010).

In any case where the issue of the right of possession cannot be finally determined within two weeks from the date of service of the copy of the summons and the



defendants may appeal any dispossessory judgment provided that the defendant pays rent into the registry until the issue has been determined on appeal.<sup>44</sup> Failure to pay rent into the registry rids a defendant of the right to remain in possession; however, the court must still determine appropriate issues, because the court may restore possession to a defendant or appellant if the adjudicated issues warrant.<sup>45</sup>

However limited defendants' options in dispossessory actions are, property owners face a number of hardships as well. If the defendant does not answer, O.C.G.A. § 44-7-53(a) allows the court to issue a writ of possession without a jury trial, any further evidence, or any hearings.<sup>46</sup> Here, the plaintiff is entitled to a default judgment much like in any other civil action, only much more quickly.<sup>47</sup> A plaintiff in

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copy of the affidavit, the tenant shall be required to pay into the registry of the trial court: (1) All rent and utility payments which are the responsibility of the tenant payable to the landlord under terms of the lease which become due after the issuance of the dispossessory warrant, said rent and utility payments to be paid as such become due . . . ; and (2) All rent and utility payments which are the responsibility of the tenant payable to the landlord under terms of the lease allegedly owed prior to the issuance of the dispossessory warrant; provided, however, that, in lieu of such payment, the tenant shall be allowed to submit to the court a receipt indicating that payment has been made to the landlord.

*Id.* "If the tenant should fail to make any payment as it becomes due pursuant to paragraph (1) or (2) of subsection (a) of this Code section, the court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff, the deputy, or the constable." O.C.G.A. § 44-7-54(b) (2010).

44. O.C.G.A. § 44-7-56 (2010).

If the judgment of the trial court is against the tenant and the tenant appeals this judgment, the tenant shall be required to pay into the registry of the court all sums found by the trial court to be due for rent in order to remain in possession of the premises. The tenant shall also be required to pay all future rent as it becomes due into the registry of the trial court pursuant to paragraph (1) of subsection (a) of [§] 44-7-54 until the issue has been finally determined on appeal.

*Id.*

45. *Thomas*, 409 S.E.2d at 74.

Even if tenants have not paid rent into court and have consequently lost possession pending trial . . . or pending appeal . . . possession of the premises may still be restored to them when the issues are tried or considered on their merits on appeal. That is why the fact that appellee is in physical possession of the premises does not render moot the question of its ultimate legal right to that possession.

*Id.*

46. O.C.G.A. § 44-7-53(a) (2010). "If the tenant fails to answer . . . the court shall issue a writ of possession . . . . The court, without the intervention of a jury, shall not require any further evidence nor hold any hearings and the plaintiff shall be entitled to a verdict and judgment by default . . . ." *Id.*

47. O.C.G.A. § 44-7-51(b) (2010). "The summons served on the defendant pursuant to subsection

a dispossessory proceeding may obtain an enforceable judgment within fourteen days, whereas a plaintiff in a civil suit will typically do so in fifty-five days.<sup>48</sup> However, if the defendant does answer, § 44-7-53(b) requires a “trial of the issues.”<sup>49</sup> Thus, a court must conduct a trial even if a defendant answers and presents no evidence of any genuine issue.<sup>50</sup> Though § 44-7-53 provides that “every effort should be made by the trial court to expedite a trial of the issues,” property owners are still left subject to the scheduling availabilities of the courts, more attorneys’ fees, and further expenses of time and effort before the court may issue a judgment.<sup>51</sup> Further, such a trial may be necessary even when a defendant has presented no evidentiary basis with which to dispute any of the plaintiff’s claims.<sup>52</sup>

Thus, Georgia dispossessory proceedings currently occupy a middle ground that often denies either party an entirely appropriate remedy. A defendant who knows the plaintiff holds invalid title through a wrongful foreclosure has no ability to remain in possession of the property while proving the claim.<sup>53</sup> Even if a defendant successfully defends or appeals, he must unequivocally pay rent into the court registry without regard for whether a plaintiff’s alleged

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(a) of this Code section shall command and require the tenant to answer either orally or in writing within seven days from the date of the actual service . . .” *Id.* § 44-7-53(a) provides that the court shall issue a writ of possession “notwithstanding Code Section 9-11-55 or Code Section 9-11-62.” O.C.G.A. § 44-7-53(a) (2010). The former allows default judgment for the plaintiff fifteen days after the defendant’s failure to answer within the time required, which is generally thirty days. O.C.G.A. § 9-11-12, -55 (2015). The latter provides that “[n]o execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry.” O.C.G.A. § 9-11-62 (2015).

48. O.C.G.A. §§ 44-7-52(b) to -53(a); §§ 9-11-12 to -55, -62.

49. O.C.G.A. § 44-7-53(b) (2010).

If the tenant answers, a trial of the issues shall be had in accordance with the procedure prescribed for civil actions in courts of record except that if the action is tried in the magistrate court the trial shall be had in accordance with the procedures prescribed for that court.

*Id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. *Hurt v. Nw. Mortg., Inc.*, 580 S.E.2d 580, 586 (Ga. Ct. App. 2003) (“A challenge to the validity of foreclosure in defense of a dispossessory proceeding will not lie.”); *Bellamy v. Fed. Deposit Ins. Corp.*, 512 S.E.2d 671, 675 (Ga. Ct. App. 1999) (“After foreclosure sale, the former owner cannot attack dispossession without first setting aside the foreclosure and deed.”).

wrongdoings have thwarted defendant's ability to do so.<sup>54</sup> Conversely, a defendant may answer a dispossessory action with empty allegations and no evidentiary basis, yet a plaintiff may not obtain relief through any summary judgment, and the court must schedule and conduct a trial of the issues in full accordance with civil procedures.<sup>55</sup> A solution that, when necessary, (1) better equips defendants to legitimately challenge dispossessory actions and (2) provides property owners with appropriately swifter remedies would allow courts to conduct either a full and fair trial or none at all, thus providing as complete a remedy as possible to the deserving party.

## II. ANALYSIS

Georgia's current dispossessory scheme provides defendants with fewer available defenses than Georgia's legislative and common law history seem to warrant.<sup>56</sup> Dispossessory proceedings' rent requirement can cause defendants amplified harms; however, the requirements do serve a vital function for plaintiffs.<sup>57</sup> Defendants' available defenses and rent requirements are particularly harmful considering dispossession's equitable harms and their relativity to plaintiffs' potential damages from stays.<sup>58</sup> Despite dispossessory proceedings streamlining its process at defendants' expense, the dispossessory scheme still does not provide plaintiffs with summary judgment when defendants present no potentially valid claims.<sup>59</sup>

### A. Defendants: Available Defenses and Rent Requirement

#### 1. Available Defenses

Georgia common law history reflects a dispossessory scheme that would likely allow expanded defenses. Georgia courts, such as the

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54. O.C.G.A. §§ 44-7-54 to -56 (2010).

55. O.C.G.A. § 44-7-53(b).

56. See discussion *infra* Part II.A.1.

57. See discussion *infra* Part II.A.2.

58. See discussion *infra* Part II.A.3.

59. See discussion *infra* Part II.B.

court of appeals in *Bellamy v. FDIC*, cite settled common law that “it is not germane to a dispossessory proceeding to allege that a contract under which the plaintiff claims to derive title from the defendant is void and should be canceled.”<sup>60</sup> Cases as recent as *Howard v. GMAC Mortgage, LLC*, decided in March 2013, cite this phrase from *Bellamy* as denying a defendant the ability to assert wrongful foreclosure and similar claims as defenses to dispossessory proceedings.<sup>61</sup> *Bellamy* draws this quotation from *Womack v. Columbus Rentals*, which quoted the rule from *Crawford v. Crawford*, a 1913 Georgia Supreme Court case that denied a defendant in a dispossessory proceeding the defense that the contract under which the plaintiff derived title was void.<sup>62</sup> In fact, all Georgia cases citing precedent that wrongful foreclosure is not an appropriate defense in a dispossessory proceeding eventually trace to *Bellamy* and thus to *Crawford*.<sup>63</sup> *Crawford* supports its decision by citing *Patrick v. Cobb* and *Brown v. Bonds*, the latter of which cites the former.<sup>64</sup> *Patrick*, in turn, cites *Johnson v. Stancliffe*, which denied its dispossessory defendant the defense that the plaintiff allegedly claimed title under a void deed that was given to secure debt “at

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60. *Bellamy v. Fed. Deposit Ins. Corp.*, 512 S.E.2d 671, 674 (Ga. Ct. App. 1999).

61. *E.g.*, *Howard v. GMAC Mortg., LLC*, 739 S.E.2d 453, 455 (Ga. Ct. App. 2013); *Vines v. LaSalle Bank Nat'l Ass'n*, 691 S.E.2d 242, 243 (Ga. Ct. App. 2010); *Jackman v. LaSalle Bank, N.A.*, 683 S.E.2d 925, 927 (Ga. Ct. App. 2009).

62. *Crawford v. Crawford*, 77 S.E. 557 (Ga. 1913); *Womack v. Columbus Rentals, Inc.*, 478 S.E.2d 611, 614 (Ga. Ct. App. 1996) (“It is not germane to a dispossessory proceeding to allege ‘that a contract under which the plaintiff claims to derive title from the defendant is void and should be canceled.’” (quoting *Crawford*, 77 S.E. at 557)).

63. *E.g.*, *Jackman*, 683 S.E.2d at 927 (citing *Hurt v. Nw. Mortg., Inc.*, 580 S.E.2d 580, 586 (Ga. Ct. App. 2003) (citing *Solomon v. Nw. Mortg. Corp.*, 538 S.E.2d 783, 784 (Ga. Ct. App. 2000) (citing *Bellamy*, 512 S.E.2d 671, 674 (citing *Crawford*, 77 S.E. 557))); *Owens v. Green Tree Servicing LLC*, 684 S.E.2d 99 (Ga. Ct. App. 2009) (citing *Hague v. Kennedy*, 423 S.E.2d 283 (Ga. Ct. App. 1992) (citing *Ryals v. Atl. Life Ins. Co.*, 186 S.E. 197 (Ga. Ct. App. 1936) (citing *Crawford*, 77 S.E. 557))).

64. *Crawford*, 77 S.E. at 557–58 (“The scope of this amendment is to allege that a written contract, under which the plaintiff claims to derive title from him, is void and should be canceled. Such an amendment is not germane to the issue made by the filing of a counter affidavit to a summary proceeding to eject a tenant. There was no error in disallowing the amendment and in excluding evidence in support of it.” (citations omitted)); *Brown v. Bonds*, 54 S.E. 933, 935 (Ga. 1906) (“As defendant in the rent and supply lien foreclosure suits, petitioner could only set up such equitable defense as would be germane to that which she might allege by way of counter affidavit; she could not engraft on her statutory defense an amendment praying a cancellation of her deed to the plaintiff.” (citing *Patrick v. Cobb*, 49 S.E. 806 (Ga. 1905))).

usurious rates of interest.”<sup>65</sup> *Johnson* points to *Ray v. Home & Foreign Investment & Agency Company*, an 1899 Georgia Supreme Court case that did not involve a dispossessory proceeding.<sup>66</sup> *Ray* defined the appropriate parameters of a “cross bill” response to a claim for equitable relief.<sup>67</sup> *Ray* found that the defendant had submitted an appropriate cross bill which was “germane to the case made by the original petition.”<sup>68</sup> Thus, in 1899, *Ray* began a lineage of common law that, by *Bellamy*, had developed into a doctrine that a dispossessory defense must be “germane” to the dispossessory proceedings and reached as far as *Howard* in 2013.<sup>69</sup>

However, *Ray* seems to outline a definition of “germane” that would include modern counterclaims such as wrongful foreclosure. *Ray* cites *Josey v. Rogers* and *McDougald v. Dougherty*—both pre-1860 cases that do not cite a previous case—and § 399 of the 1892 edition of *Story’s Equity Pleading*.<sup>70</sup> This body of authority defines a cross bill as “being generally considered as a defence [sic] to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation”;<sup>71</sup> an ancillary suit,

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65. *Patrick*, 49 S.E. at 806 (“But, the proceeding being statutory, the defendant cannot by counter affidavit inject into the case an issue which is not germane to that involved in the proceeding.”); *Johnson v. Stancliffe*, 39 S.E. 296, 296 (Ga. 1901) (“The defense thereby sought to be interposed was, in substance, as follows: The association claimed title under a deed from one Alice J. Mehaffey, given to it to secure loans made to her at usurious rates of interest, and such deed was, therefore, void.”).

66. *Johnson*, 39 S.E. at 297 (referencing generally *Ray v. Home & Foreign Inv. & Agency Co.*, 32 S.E. 603 (Ga. 1899)).

67. *Ray*, 32 S.E. at 605.

68. *Id.*

69. *See id.* *See also* *Howard v. GMAC Mortg., LLC*, 739 S.E.2d 453, 455 (Ga. Ct. App. 2013); *Bellamy v. Fed. Deposit Ins. Corp.*, 512 S.E.2d 671, 674 (Ga. Ct. App. 1999).

70. *Ray*, 32 S.E. at 605 (“‘A cross bill should not introduce new and distinct matters not embraced in the original suit.’ ‘A cross bill is a bill brought by a defendant against a complainant or other parties in a former bill depending, touching the matters in question in that bill.’ . . . ‘It is treated, in short, as a mere ancillary suit, or as a dependency upon the original suit.’” (quoting *Josey v. Rogers*, 13 Ga. 478 (1853); *McDougald v. Dougherty*, 14 Ga. 674 (1854); *Story, Eq. Pl.* § 399)). These sources to which *Ray* cites all occurred before Georgia created America’s first comprehensive code in 1860, which first codified Georgia’s dispossessory scheme. Jefferson James Davis, *The Georgia Code of 1863: America’s First Comprehensive Code*, 4 J.S. LEGAL HIST. 1, 1 (1995) (“In 1860 Georgia enacted the first comprehensive code in the United States. That code went into effect January 1, 1863.”).

71. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA 373 (10th ed. 1892).

“or . . . a dependency upon the original suit”;<sup>72</sup> and a claim that “should not introduce new and distinct matters not embraced in the original suit.”<sup>73</sup> These definitions of an appropriate cross bill mirror current definitions of compulsory counterclaims, which arise “out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”<sup>74</sup>

Claims such as wrongful foreclosure are compulsory counterclaims in dispossessory proceedings.<sup>75</sup> *Bellamy* provides that “[a]ny attack on the foreclosure and the deed . . . had to be brought as a compulsory counterclaim to set aside the foreclosure deed.”<sup>76</sup> In *Bellamy*, the court of appeals cites O.C.G.A. § 9-11-13(a), which deems counterclaims that arise “out of the transaction or occurrence that is the subject matter of the opposing party’s claim” compulsory.<sup>77</sup> Thus, claims such as wrongful foreclosure are so connected to a dispossessory proceeding that those claims *must* be adjudicated within the same action, yet defendants are unable to use those claims as defenses to the dispossessory proceeding itself.<sup>78</sup> In fact, *Brown v. Bonds*—a 1906 Georgia Supreme Court case on which *Crawford* relies—states that “when the court of equity takes jurisdiction for one purpose, it holds it for all others necessary to the final settlement of all questions involved in the litigation between the parties growing out of and connected with that subject-matter.”<sup>79</sup> Indeed, “equity seeks always to do complete justice.”<sup>80</sup>

Georgia courts legitimize these compulsory counterclaims’ exclusion from dispossessory defenses by reasoning that “claimed defects in the landlord’s title to premises cannot be raised as a

72. *Id.*

73. *Josey*, 13 Ga. at 478.

74. O.C.G.A. § 9-11-13(a) (2015).

75. *See Bellamy v. Fed. Deposit Ins. Corp.*, 512 S.E.2d 671, 674 (Ga. Ct. App. 1999).

76. *Id.*

77. O.C.G.A. § 9-11-13(a); *see Bellamy*, 512 S.E.2d at 674.

78. *Bellamy*, 512 S.E.2d at 674 (holding both that wrongful foreclosure is not a defense to a dispossessory proceeding and that defendants must bring claims such as wrongful foreclosure as counterclaims in dispossessory proceedings lest res judicata later bar them).

79. *Brown v. Bonds*, 54 S.E. 933, 935 (Ga. 1906) (quoting *Clay v. Banks*, 71 Ga. 363, 374 (1883)).

80. O.C.G.A. § 23-1-7 (1982). §23-1-7 continues that “[h]ence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose.” *Id.*

defense”<sup>81</sup> and—specifically regarding wrongful foreclosure—that “[t]he purchaser at a foreclosure sale under a power of sale in a security deed is the sole owner of the property until and unless the sale is set aside.”<sup>82</sup> However, a valid wrongful foreclosure claim would destroy a plaintiff’s title as entirely as a valid allegation of a fraudulent deed or any other appropriate dispossessory defense.<sup>83</sup> A plaintiff who fraudulently manufactured a deed is no less deserving of title, nor of landlord status over the defendant, than a plaintiff who committed fraud in the property’s foreclosure, especially in the context of an expedited trial.<sup>84</sup> The issue in a dispossessory proceeding is “tenancy or no tenancy;” however, this issue’s clarity is as dependent on claims such as wrongful foreclosure as it is on whether a deed is fraudulent.<sup>85</sup>

Further, dispossessory laws were quite different when nineteenth and early twentieth century courts created the common law from which Georgia courts now draw the narrow definition of dispossessory defenses. Plaintiffs stood to lose much more from a drawn-out dispossessory proceeding under this law than plaintiffs now stand to lose. Particularly, Georgia legislators overhauled dispossessory proceedings and enacted O.C.G.A. § 44-7-54 in 1970—in addition to many other sections of the current dispossessory scheme—providing for defendant’s payment of rent into the court registry during trial and proper disbursement after

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81. *Hague v. Kennedy*, 423 S.E.2d 283, 286 (Ga. Ct. App. 1992) (citing *Ryals v. Atl. Life Ins. Co.*, 186 S.E. 197 (Ga. Ct. App. 1936)).

82. *Bellamy*, 512 S.E.2d at 674.

83. FRANK S. ALEXANDER ET AL., *GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW* § 8:11 (database updated Oct. 2014).

Successful actions at law for damages resulting from wrongful foreclosure are possible, though proof of damages is difficult when the foreclosure is set aside as a matter of equity.

. . . .

. . . The debtor may seek either to set aside the foreclosure or to recover damages for the value of the property, but not both.

*Id.*

84. O.C.G.A. § 44-7-53(b) (2010) (“Every effort should be made by the trial court to expedite a trial of the issues.”).

85. *Hamilton v. Darden*, 198 S.E. 805, 805 (Ga. Ct. App. 1938) (“An issue made by the filing of a counter-affidavit to a dispossessory warrant is tenancy or no tenancy, and the question of the plaintiff’s title is not involved.”).

trial.<sup>86</sup> Before 1970, the Georgia dispossessory scheme was near untouched since the nineteenth century.<sup>87</sup> Specifically, § 61–303 provided defendants only the defense that they either (a) were tenants but were not holding possession beyond a lease term or (b) were not holding possession at all from the plaintiff or anyone else.<sup>88</sup> If defendants provided such a defense to “arrest the proceedings,” law also required that they “tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case.”<sup>89</sup> What plaintiffs could recover against defendants was “double the rent reserved or stipulated to be paid,” not including until 1947 double rent during and after trial until tenant delivered possession.<sup>90</sup> Thus, pre-1970 law provided neither an avenue for defendants to remain in possession without paying double the backed rent claimed by the plaintiff upfront nor a way for the proceedings to continue without plaintiffs losing any rent over the bond amount which might accrue during the proceedings until at least 1947. Currently, Georgia law provides both, yet appropriate defenses in common law still reflect a nineteenth-century body of law under which claims such as wrongful foreclosure severely threatened plaintiffs’ financial interests.<sup>91</sup>

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86. S.B. 250, 109th Gen. Assemb., Reg. Sess. (Ga. 1970).

An Act to amend the Code Chapter 61-3, relating to proceedings against tenants holding over, . . . so as to provide for . . . tenant’s remaining in possession during the litigation; to provide for payment of rent; to provide for payment or accounting to the court for back rent allegedly owed; as it becomes due into court during the litigation, to provide for disbursement of the rent money paid into court.

*Id.* This Act struck entirely and rewrote §§ 61–302, -303, -304, -305, and -306, and their replacements are now O.C.G.A. §§ 44-7-51, -53, -54, -55, and -56, respectively. O.C.G.A. §§ 44-7-51, -53, -54, -55, -56 (2010); S.B. 250.

87. Ga. Code Ann. §§ 61-302 to -306 (West 1981). Before 1970, § 61-302 had last been amended in 1896, § 61-303 in 1866, § 61-304 not since its creation in 1827, § 61-305 in 1947 (providing for additional double rent until tenant delivered possession after judgment against tenant), and § 61-306 in 1957 and 1968 (both regarding notice to tenant). Ga. Code Ann. §§ 61-302 to -306 (West 1981); S.B. 3, 86th Gen. Assemb., Reg. Sess. (Ga. 1947); H.B. 63, 96th Gen. Assemb., Reg. Sess. (Ga. 1957); H.B. 911, 107th Gen. Assemb., Reg. Sess. (Ga. 1968).

88. Code of Ga. of 1933, § 61-303 (repealed 1970).

89. *Id.*

90. Code of Ga. of 1933, § 61-305 (repealed 1970); S.B. 3, 86th Gen. Assemb., Reg. Sess. (Ga. 1947) (“[S]uch judgment shall also provide for the payment of future double rent until the tenant surrenders possession of the lands of tenements to the landlord after an appeal or otherwise . . .”).

91. O.C.G.A. §§ 44-7-54, -56 (2010).



Thus, Georgia law has continued since the nineteenth century to recognize the inseparable nature of the dispossessory proceeding itself and counterclaims attacking the validity of a dispossessory plaintiff's title, but the connection that created this inseparability has not retained its logical necessity that "both causes may be heard together, and one decree cover both."<sup>92</sup> Surely a counterclaim that (1) no longer poses as severe a threat to plaintiffs and (2) shares enough subject matter with a dispossessory proceeding that defendants must assert that counterclaim in the same action warrants full adjudication of that shared subject matter before defendants lose possession of the property entirely.

## 2. Rent Requirement

Even if defendants do present an appropriate defense, they must pay rent into the registry of the court pending resolution.<sup>93</sup> This rent requirement does not account for defendants whose counterclaims' underlying allegations may deprive defendants of their ability to pay rent.<sup>94</sup> The downtown Atlanta homeless shelter—even considering an effective stay of the dispossessory action while the parties adjudicated title validity—could not pay rent into the registry *because* of the alleged actions underlying the shelter's counterclaims.<sup>95</sup> Thus, an alleged action that wrongfully deprived a defendant of possessory rights may also deprive the defendant of the ability to adjudicate that very wrongful action without first losing possession.

Dispossessory proceedings' rent requirement serves an important function for plaintiffs. Without the requirement, plaintiffs risk

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92. McDougald v. Dougherty, 14 Ga. 674, 674 (1854). "A cross-bill is a bill brought by a defendant against a complainant or other parties in a former bill depending, touching the matters in question in that bill. And the bill should be so framed, that both causes may be heard together, and one decree cover both." *Id.*

93. O.C.G.A. §§ 44-7-53, -54 (2010).

94. *See id.*

95. Land, *supra* note 6 ("Since the Task Force is unable to pay any 'substantive rent,' [Task Force's attorney] wrote, it will inevitably be forced out unless [the judge] relieves that requirement until the entire case can go to trial.").

significant financial losses both during and after trial.<sup>96</sup> Unlike the losses plaintiffs suffer from expanded defenses—which plaintiffs will, because of the rent requirement, but later regain if plaintiffs prevail at trial—the losses plaintiffs suffer in the absence of a rent requirement are permanent.<sup>97</sup> If defendants cannot pay rent during trial—whatever the cause—defendants certainly will not be able to pay arrears, additional damages, or both if the plaintiff prevails at trial. Thus, rent requirements importantly prevent defendants from living essentially rent-free for as long as they are able to draw out a dispossessory proceeding.<sup>98</sup>

### 3. *The Importance of Possession*

Defendants are able to adjudicate remaining claims after a court grants a writ of possession to the plaintiff.<sup>99</sup> As the court of appeals noted in *Wells Fargo*, “possession of the premises may still be restored to [defendants] when the issues are tried or considered on their merits on appeal.”<sup>100</sup> However, the negative effects of defendants losing possessory rights are difficult to later restore, especially relative to the effects on plaintiffs of a dispossessory proceeding’s stay until counterclaims’ adjudication.

The most severe effects on defendants include suspension of housing benefits and threat of homelessness.<sup>101</sup> Evicted tenants often lose government housing subsidies that contribute heavily to their ability to obtain housing.<sup>102</sup> When consumer reports reflect an eviction, even more financially stable tenants face issues obtaining

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96. Land, *supra* note 4 (quoting the homeless shelter’s landlord’s attorney as stating that, while the court allowed the shelter to adjudicate its claims without paying rent into the court registry, “the [shelter] continues to live rent-free in [plaintiff’s] property, in which [plaintiff] has real dollars invested . . . , [so] [r]ight now, the [shelter] has a court-sanctioned free-ride on rent, insurance, taxes and utilities, to the detriment of [plaintiff] and indeed to others who have to pick up the tab.”).

97. See O.C.G.A. § 44-7-54 (2010) (“That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court.”).

98. See, e.g., Land, *supra* note 4.

99. Thomas v. Wells Fargo Credit Corp., 409 S.E.2d 71, 74 (Ga. Ct. App. 1991).

100. *Id.*

101. Spector, *supra* note 12, at 415.

102. *Id.* at 415–17.

replacement housing, insurance, or even employment.<sup>103</sup> Further, these threats may extend far beyond tenants themselves when tenant organizations and businesses provide community services.<sup>104</sup> Atlanta's largest homeless shelter—according to its director—faced leaving hundreds of homeless Georgians with “nowhere to go.”<sup>105</sup>

Since 1970, plaintiffs, especially if defendants *are* able to pay rent into the court registry, risk only timely payment.<sup>106</sup> Plaintiffs likely even receive interest and further litigation-related damages if the trial concludes in their favor.<sup>107</sup> Thus, plaintiffs risk a relatively fungible harm from a delay of their possessory rights, but reinstating defendants' lost possessory rights after trial hardly negates the interim effects on defendants.

#### B. Plaintiff: Summary Judgment

O.C.G.A. § 44-7-53(b) requires a “trial of the issues” if the defendant answers the summons.<sup>108</sup> Though defendants have no right to a trial by jury in dispossessory proceedings, § 44-7-53(b) provides at least a bench trial.<sup>109</sup> Although “every effort should be made by the trial court to expedite a trial of the issues,” property owners are subject to the scheduling availabilities of the courts, more attorneys'

103. *Id.*

104. *See* Cook, *supra* note 1.

105. *Id.* (“Without the Peachtree-Pine shelter, Beatty says, the homeless she serves will have nowhere to go.”).

106. O.C.G.A. § 44-7-54(c) (2010).

That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court. If either party appeals the decision of the trial court, that part of the funds equal to any sums found by the trial court to be due from the landlord to the tenant shall remain in the registry of the court until a final determination of the issues. The court shall order the clerk to pay to the landlord without delay the remaining funds in court and all payments of future rent made into court pursuant to paragraph (1) of subsection (a) of this Code section unless the tenant can show good cause that some or all of such payments should remain in court pending a final determination of the issues.

*Id.*

107. *See id.*

108. O.C.G.A. § 44-7-53(b) (2010).

109. *See id.*; *West v. Veterans Admin.*, 357 S.E.2d 121, 122 (Ga. Ct. App. 1987) (holding that “[t]here is no right to trial by jury in a summary dispossessory action”), *abrogated by Hill v. Levenson*, 383 S.E.2d 110 (Ga. 1989).

fees, and further expenses of time and effort before the court issues a judgment.<sup>110</sup> Such delay is especially unwarranted when a defendant presents no evidentiary bases with which to dispute the plaintiff's claims.<sup>111</sup>

Defendants must answer in only seven days, and therefore answers may contain only a fraction of the facts or counterclaims defendants may present later.<sup>112</sup> However, a guaranteed trial is not entirely necessary to ensure full consideration of defendants' allegations, since defendants may—and often do—amend their answer before trial to be more comprehensive than was possible within the initial seven day window.<sup>113</sup> Courts therefore may determine the potential validity of a defendant's case without holding a trial. Currently, a defendant may respond to a summons with an answer, which no court considers a possible defense—or to even concern the case or property—yet the court must conduct a trial.<sup>114</sup> Dispossessory proceedings are meant to provide landlords with quick and efficient means of eviction when the situation warrants, yet dispossessory proceedings fail to provide landlords with the quickest means of judicial decision in situations which warrant it most: a summary judgment when defendants present no semblance of a triable matter.<sup>115</sup>

### III. PROPOSAL

Defenses to dispossessory actions should include compulsory counterclaims that, if valid, would legally destroy plaintiffs' title.<sup>116</sup> If defendants wield expanded potential defenses, Georgia

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110. O.C.G.A. § 44-7-53(b) (2010).

111. *See id.*

112. O.C.G.A. § 44-7-51(b) (2010).

113. *Cf. Foy v. McCrary*, 121 S.E. 804 (Ga. 1924) (holding that an amendment to an answer to dispossessory summons is allowable to allege more specific facts under its theory of defense even after both parties have introduced their evidence at trial).

114. *See* O.C.G.A. § 44-7-53(b) (2010).

115. O.C.G.A. § 9-11-56(c) (2014) (providing for summary judgment without a trial when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

116. *See* discussion *infra* Part III.A.1.

dispossessory proceedings' rent requirement is vital to the process's integrity.<sup>117</sup> Dispossessory proceedings should provide a property owner with a narrow avenue for summary judgment when a defendant's response presents no matter for trial.<sup>118</sup>

*A. For Defendants, Expand Defenses, but Retain Rent Requirement*

*1. Defenses*

Defenses to dispossessory actions should include compulsory counterclaims that, if valid, would legally destroy plaintiffs' title. Such an expansion should include neither claims which, if valid, would destroy plaintiff's title but do not have sufficient factual connection to the dispossessory proceeding, nor claims which have sufficient factual connections to the dispossessory proceedings but, if valid, would not destroy plaintiff's title. Wrongful foreclosure may be the most likely counterclaim under this standard, but other responses may also pass this test and allow defendants to settle the action's underlying facts before losing possession.<sup>119</sup>

Requiring such claims be compulsory counterclaims would ensure that defenses are appropriately—indeed inseparably—connected to the factual matters in dispute in a dispossessory proceeding. Dispossessory proceedings' Georgia common law history traces to the doctrine that cross-bills to equity claims must sufficiently relate to the matters at issue.<sup>120</sup> Claims such as wrongful foreclosure are compulsory counterclaims in dispossessory proceedings: *res judicata* bars a defendant from later bringing such a claim in a separate action because the claim involves the same transaction as the dispossessory

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117. See discussion *infra* Part III.A.2.

118. See discussion *infra* Part III.B.

119. *E.g.*, *Crawford v. Crawford*, 77 S.E. 557 (Ga. 1913) (written contract under which the plaintiff claimed to derive title allegedly obtained by fraud and therefore void); *Sanders v. Daniel*, 691 S.E.2d 244, 246 (Ga. Ct. App. 2010) (defendant arguing that plaintiff's title to the property was invalid because the company from which defendant bought the property had obtained an order quieting title from the Fulton County Superior Court, which lacked subject matter jurisdiction over the property, which was located in Monroe County).

120. See discussion *supra* Part II.A.1.

claim.<sup>121</sup> Thus, compulsory counterclaims logically meet the standard from which Georgia courts draw appropriate dispossessory defenses: that the claim must be “touching the matters in question.”<sup>122</sup>

Requiring that the claims, if valid, legally destroy plaintiff’s title would ensure that defenses carry the same legal effect as current appropriate defenses: invalidation of the tenancy. Georgia courts currently state the issue in a dispossessory proceeding as “tenancy or no tenancy” and draw from that issue that “the question of the plaintiff’s title is not involved.”<sup>123</sup> However, a plaintiff’s title must, to a certain degree, be involved in order to assure a defendant complete access to the issue of tenancy.<sup>124</sup> Invalid title, however achieved, effectuates an invalid tenancy.<sup>125</sup>

Further, expanded defenses under this standard would subject all claims involving the action’s subject matter to dispossessory proceedings’ “expedited trial.”<sup>126</sup> Once a court issues a writ of possession, any remaining claims will likely continue as a normal civil action, not an action in which “[e]very effort should be made by the trial court to expedite a trial of the issues.”<sup>127</sup> Thus, a defendant with a valid wrongful foreclosure or similar counterclaim who must adjudicate that claim after the court issues the writ is without

121. *Bellamy v. Fed. Deposit Ins. Corp.*, 512 S.E.2d 671, 674 (Ga. Ct. App. 1999) (“[A]ny defect in the advertising of the foreclosure, conduct of sale, deed under power of sale, or other basis to set aside the foreclosure had to be asserted as a compulsory counterclaim or it becomes barred by res judicata.”); *Trust Co. Bank of Nw. Ga. v. Shaw*, 355 S.E.2d 99, 101 (Ga. Ct. App. 1987) (holding that res judicata would bar a prior dispossessory defendant from instituting a tort action for damages stemming from landlord’s failure to maintain premises because the dispossessory proceeding satisfied res judicata’s “same transaction” test).

122. *Ray v. Home & Foreign Inv. & Agency Co.*, 32 S.E. 603, 605 (Ga. 1899) (“A cross bill is a bill brought by a defendant against a complainant or other parties in a former bill depending, touching the matters in question in that bill.”) (citing *McDougald v. Dougherty*, 14 Ga. 674 (1854)).

123. *Jones v. Windham*, 168 S.E. 6, 7 (Ga. 1933).

124. *E.g.*, *Egana v. HSBC Mortg. Corp.*, 669 S.E.2d 159, 161 (Ga. Ct. App. 2008) (holding that an allegedly fraudulent security deed was an appropriate defense); *Wilbanks v. Arthur*, 570 S.E.2d 664, 665 (Ga. Ct. App. 2002) (holding that defendant’s mother allegedly acquiring title from plaintiff through adverse possession was an appropriate defense); *Sanders*, 359 S.E.2d at 398 (holding that the document between the parties allegedly being a sales contract, not a lease, was an appropriate defense).

125. O.C.G.A. § 44-7-50(a) (2010). § 44-7-50 provides that “the *owner* or the agent, attorney at law, or attorney in fact of the *owner*” may make the affidavit that commences a dispossessory action. *Id.* (emphasis added).

126. O.C.G.A. § 44-7-53(b) (2010).

127. *Id.*

possession longer—potentially much longer—than a plaintiff would be without possession if a defendant’s counterclaim is not valid and the court settles the claim before issuing the writ. This longer period without possession coupled with the severity of defendants’ harms from lack of possession, relative to plaintiffs’, leaves defendants with even more to lose.<sup>128</sup>

Some courts may already recognize the claims’ inseparability, such as in the litigation between Metro Atlanta Task Force for the Homeless and its landlord.<sup>129</sup> There, the court, after staying the dispossessory in order to settle the issue of title, allowed the shelter’s landlord to proceed with eviction only because the shelter was unable to pay rent.<sup>130</sup> Regardless, Georgia dispossessory proceedings’ defenses are not statutory; courts may expand defenses with a shift in common law doctrine.<sup>131</sup>

## 2. Rent Requirement

If defendants wield expanded potential defenses, Georgia dispossessory proceedings’ rent requirement is vital to the process’s integrity. If the pool of possible dispossessory defenses expands, trial lengths may increase.<sup>132</sup> Georgia law cannot—and indeed does not—leave plaintiffs with no assurance of payment during and after trial in such a situation.<sup>133</sup>

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128. See discussion *supra* Part II.A.3.

129. Land, *supra* note 6; Land, *supra* note 4; Greg Land, *Judge Weighs Ordering Task Force to Pay Rent, Allowing Appeal*, FULTON COUNTY DAILY REPORT (Sept. 14, 2014), <http://www.dailyreportonline.com/id=1202669784710/CORRECTED-Judge-Weighs-Ordering-Task-Force-to-Pay-Rent-Allowing-Appeal?slreturn=20160210102448> [hereinafter Land, *Ordering Task Force to Pay Rent*] (“The [Georgia Supreme Court] justices said that the shelter already had an ‘adequate remedy at law’ to challenge the dispossessory, saying a plea in abatement can halt dispossessories while ‘substantially the same questions of title’ are resolved.”).

130. Land, *Ordering Task Force to Pay Rent*, *supra* note 129.

131. See discussion *supra* Part II.A.1.

132. O.C.G.A. § 44-7-53(b) (2010). Though dispossessory trial times may increase, total time spent adjudicating defendants’ counterclaims may well decrease, since the parties would likely still adjudicate many compulsory counterclaims, which would invalidate plaintiff’s title post-writ and therefore not in an expedited trial. *Id.*

133. O.C.G.A. § 44-7-54(c) (2010).

The court shall order the clerk of the court to pay to the landlord the payments claimed under the rental contracts . . . provided, however, that, if the tenant claims that he or she is entitled to all or any part of the funds and such claim is an issue

The rent requirement causes plaintiffs to risk only timely payment if the court stays a dispossessory proceeding in order to adjudicate defendants' defenses.<sup>134</sup> Without dispossessory proceedings' rent requirement, defendants may live rent-free for as long as they may prolong the proceeding.<sup>135</sup> If courts provide defendants with expanded defenses, landlords are likely left with a financially insurmountable amount of unpaid rent after trial and no way to collect. Plaintiffs simply cannot operate at a financial loss while proving title. Even if a defendant may contest a plaintiff's title and remain in possession during an expedited trial, Georgia law cannot presume that the plaintiff's title is invalid until proven valid.<sup>136</sup>

Tolling the rent requirement when defendants' counterclaims allege plaintiff wrongdoings that have themselves left defendants unable to pay rent is unworkable, benefitting defendants during trial but threatening plaintiffs who prevail at trial with financial devastation.<sup>137</sup> Especially if defendants are unable—rather than just unwilling—to pay rent pending adjudication, they will certainly be unable to pay arrears or further interim damages if the property

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of controversy in the litigation, the court shall order the clerk to pay to the landlord without delay only that portion of the funds to which the tenant has made no claim . . . . That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court. If either party appeals . . . any sums found by the trial court to be due from the landlord to the tenant shall remain in the registry of the court until a final determination of the issues. The court shall order the clerk to pay to the landlord without delay the remaining funds in court and all payments of future rent made . . . unless the tenant can show good cause that some or all of such payments should remain in court pending a final determination of the issues.

*Id.*

134. See discussion *supra* Part II.A.3.

135. See, e.g., Land, *supra* note 4.

136. O.C.G.A. § 44-7-50 (2010); Rucker v. Fuller, 276 S.E.2d 600 (Ga. 1981); Henry v. Wild Pine Apartments, 340 S.E.2d 233 (Ga. Ct. App. 1986); Lamb v. Hous. Auth., 247 S.E.2d 597 (Ga. Ct. App. 1978). Until trial, the court does hold more evidence of validity of a plaintiff's titles than otherwise, since a plaintiff must commence a dispossessory proceeding with an affidavit of the facts and a defendant's answer need not be supported by admissible evidence, if at all, until trial. § 44-7-50 ("If the tenant refuses or fails to deliver possession when so demanded, the owner may . . . make an affidavit under oath to the facts."); Rucker, 276 S.E.2d at 602 (holding that what constitutes "answer" in a dispossessory proceeding is to be liberally construed); Henry, 340 S.E.2d at 234 (holding that a tenant's answer to a dispossessory complaint need not be verified); Lamb, 247 S.E.2d at 598-99 (holding that a tenant's answer need not meet the formalities required for other judicial proceedings but not expressly required for a dispossessory proceeding).

137. See discussion *supra* Parts II.A.2, 3.



owner prevails at trial. Even judicial balancing of plaintiffs' financial harms from tolling rent and harms to and outside of defendants themselves, such as in the community, leaves plaintiffs in an unworkable financial situation. Landlord concern about such situations could even leave community-beneficial plaintiffs at economic disadvantages.

The rent requirement requires defendants to invest in their defense's validity and therefore lowers the likelihood of frivolous defenses while assuring defendants will not live rent-free for the duration of a court action and never be held responsible for plaintiffs' interim financial losses. Thus, Georgia dispossessory proceedings' current rent requirement is effective and vital to the integrity of the process, especially if defendants possess expanded defenses.

*B. For Plaintiffs, Provide Summary Judgment*<sup>138</sup>

Dispossessory proceedings should provide property owners with a narrow avenue for summary judgment when defendants' responses present no triable matter. Summary judgment in dispossessory proceedings should be much narrower than in other civil contexts. Since defendants must respond to summons within seven days, defendants often may not have enough time to present a complete set of facts or to research and advance legal arguments.<sup>139</sup> Thus, courts cannot grant summary judgments unless courts first identify that defendants have presented the facts and arguments with which they

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138. For a proposed bill to provide summary dispossessory judgment in dispossessory proceedings, see H.B. 928, 152d Gen. Assemb., Reg. Sess. (Ga. 2013). This bill does not explicitly provide for the high deference to defendants or assurance that defendants have presented the facts and arguments with which they intend to defend called for in *infra* Part III.B. The bill does reflect (1) a recognized need for summary dispossessory judgment in Georgia and (2) the unique practical considerations involved in summary dispossessory judgment, such as overnight delivery of the summary judgment motion and a shorter, five-day response window. H.B. 928, 152d Gen. Assemb., Reg. Sess. (Ga. 2013).

139. O.C.G.A. § 44-7-51(b) (2010).

The summons served on the defendant pursuant to subsection (a) of this Code shall command and require the tenant to answer . . . within seven days from the date of the actual service unless the seventh day is a Saturday, a Sunday, or a legal holiday, in which case the answer may be made on the next day which is not a Saturday, a Sunday, or a legal holiday.

*Id.*

intend to defend against the dispossessory action.<sup>140</sup> This identification may come most naturally at the expiration of the window for response to a plaintiff's motion for summary judgment.

Even when defendants have fully presented their assertions, courts must give dispossessory defendants a much higher level of deference than courts afford defendants in other civil contexts. Once again, courts cannot hold defendants who must answer in seven days to the same standards to which courts hold defendants who must answer in thirty days.<sup>141</sup> However, a smaller time frame in which defendants must answer does not warrant a lack of pleading standards altogether or an absolute assurance of a trial in the event of *any* answer. Thus, while courts should not—as in other civil contexts—issue summary judgment for plaintiffs if the pleadings together show no genuine issue as to any material fact, courts may fairly issue summary judgment if a highly defendant-deferent evaluation of the pleadings shows no latent defenses or dormant material issues.

Dispossessory proceedings' streamlined process requires a certain amount of defendant deference to ensure that the process does not leave defendants unheard. However, an automatic trial for any answer overcompensates and leaves courts conducting trials of formality in which all issues are clear. Thus, a narrow summary judgment standard in which courts (1) ensure that defendants have presented a reasonable reflection of their arguments and (2) give

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140. O.C.G.A. § 9-11-56 (2014). Even with a higher level of deference to defendants than ordinary summary judgment, a summary judgment in a dispossessory proceeding must be sure not to leave defendants without opportunities to dispute the summary judgment that ordinary summary judgment gives; dispossessory proceedings' streamlined nature may not provide time for response by affidavit and, most notably, a summary judgment hearing. *Id.*

The motion shall be served at least 30 days before the time fixed for the hearing.

The adverse party prior to the day of hearing may serve opposing affidavits . . . .

When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

§ 9-11-56(c)(e).

141. O.C.G.A. § 9-11-12 (2015) (“A defendant shall serve his answer within 30 days after the service of the summons and complaint upon him, unless otherwise provided by statute.”).

deference to potential latent issues for trial will spare plaintiffs the financial and temporal burdens of unnecessary trials.

#### CONCLUSION

Georgia dispossessory proceedings currently provide neither property owner plaintiffs nor tenant defendants with entirely fair relief.<sup>142</sup> Current common law doctrine provides dispossessory defendants with fewer available defenses than Georgia legislative and common law history appears to warrant.<sup>143</sup> Dispossessory proceedings' statutory rent requirement, while serving a vital function for plaintiffs, can cause defendants amplified harms.<sup>144</sup> Defendants' available defenses and rent requirements are particularly harmful considering dispossession's equitable harms—those harms' relativity to plaintiffs' potential damages from stays, and defendants' suffering those harms longer than plaintiffs.<sup>145</sup> Though dispossessory proceedings disadvantage defendants for the sake of a streamlined process, the dispossessory scheme still requires a trial if defendants answer the summons, regardless of the answer's content or whether it presents any triable matter.<sup>146</sup>

Defenses to dispossessory actions should include compulsory counterclaims that would legally destroy plaintiffs' title if valid.<sup>147</sup> Courts may create such an expansion through a shift in common law doctrine.<sup>148</sup> If defendants wield expanded potential defenses, Georgia dispossessory proceedings' rent requirement is vital to the process's integrity.<sup>149</sup> The harms that the rent requirement causes to certain defendants cannot overcome the destructive effects that tolling or balancing the rent requirement would cause to plaintiffs, especially if

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142. See discussion *supra* Part II.

143. See discussion *supra* Part II.A.1.

144. See discussion *supra* Part II.A.2.

145. See discussion *supra* Parts II.A.3, III.A.1.

146. See discussion *supra* Part II.B.

147. See discussion *supra* Part III.A.1.

148. See discussion *supra* Part III.A.1.

149. See discussion *supra* Part III.A.2.

courts avail defendants to broader defenses.<sup>150</sup> Finally, dispossessory proceedings should provide property owners with a narrow avenue for summary judgment when defendants' answers present no triable matter.<sup>151</sup> Though much narrower than other summary judgments, such an option will at least rid plaintiffs of trials when no triable matter exists for a bench determination.<sup>152</sup>

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150. See discussion *supra* Part III.A.2.

151. See discussion *supra* Part III.B.

152. See discussion *supra* Part III.B.