IN THE MAGISTRATE COURT OF FULTON COUNTY
STATE OF GEORGIA

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|---|---|---|
| LETRES D. GRIER, | * | |
| | * | |
| Plaintiff, | * | |
| | * | FILE NO.: 03MS030410 |
| vs. | * | |
| | * | |
| SOUTHERN REALTY MANAGEMENT, INC., d/b/a OVERLOOK TOWNHOMES | * | |
| | * | |
| | * | |
| Defendant. | * | |

**BRIEF IN SUPPORT OF MOTION TO SET ASIDE DEFAULT**

FACTS

1. Facts of underlying case and meritorious defense.

The plaintiff in this case contends that she suffered injury when a piece of sheetrock within her apartment fell and struck her in the head. Defendant expects the evidence in the case to demonstrate the following:

A. Plaintiff was a tenant of the Overlook Townhouse apartments and pursuant to her lease was in exclusive possession of the area at issue.

B. The problems with the ceiling occurred when the plaintiff's own toilet within her apartment became clogged and overflowed. The plaintiff was unable to control the leak.

C. The defendant was on no notice of the defect in question.

a) In fact, defendant expects the evidence to show that the very day before the incident the Atlanta Housing Authority conducted an inspection of the plaintiff's apartment and noted no problems with the ceiling and no problems with the plumbing.

b) The defendant was not on notice of any danger associated with the leak at issue. The incident in question occurred before business hours. Though the plaintiff called the maintenance pager she did not leave her number nor did she suggest that she was faced with a dangerous situation. The plaintiff called the fire department.

D. Defendant expects the evidence to show that the fire department and management actually removed damaged portions of the sheetrock ceiling before it fell.

E. Finally and most significantly, there is no evidence at all that the defendant had superior knowledge of the hazard. Quite to the contrary, the plaintiff had actual knowledge of the claimed hazard and the defendant had none.

F. Defendant submits that it has multiple meritorious defenses to liability.

2. Facts pertaining to the reasons for default.

The facts relating to the case are fairly simple. After the accident at issue, the plaintiff's lawyer submitted a claim to the defendant which it in turn relayed to its insurance carrier. The insurance carrier evaluated the claim. For the reasons stated in the preceding section of the brief and because of the suspect nature of the damages, the insurance carrier denied the claim and closed the file. On September 22, 2003, Southern Realty was served with a copy of the summons and complaint and forwarded it to the insurer. Apparently because of a clerical error, the lawsuit was matched with its file number and sent to a closed file.

The defendant, based on prior experience and based upon the fact that the insurer had been handling this claim, believed that the insurance company was taking care of the matter. The defendant relied on its insurance company to handle the claim.

It was not until the defendant received notice of the hearing that the insurer discovered the error, at which point, counsel was immediately employed and counsel contacted the plaintiff's attorney.

## ARGUMENT AND CITATION OF AUTHORITY

The procedure for opening defaults in Magistrate's Court is set forth in O.C.G.A. §15-10-43(f) which provides as follows:

"At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of the required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and announce ready to proceed with the trial".

This provision is identical to the grounds for setting aside the default found in O.C.G.A. §9-11-55(b). Accordingly, the case law interpreting Rule 55(b) of the Civil Practice Act is instructive if not controlling as to the interpretation to be given by this court.

A. The statute regarding opening defaults should be liberally construed.

Georgia courts have consistently held that it is the policy of this state to decided cases on their merits and that defaults are disfavored. The rule allowing opening a default is to be liberally construed so as to permit cases to be heard on their merits. Ewing v. Johnston, 174 Ga. App. 760, 334 S.E.2d 70 (1985).

In Ewing, the Court addressed whether to affirm a trial court's opening of the default so as to prevent the entry of a default judgment and held that "the rule permitting opening of default is remedial in nature and should be liberally applied, for default judgment is a drastic sanction that should be invoked only in extreme situations". The Court went on to say that… "[w]henever possible cases should be decided on their merits for default judgment is not favored by law".

In D.C. Houston v. Lowe's of Savannah, 136 Ga. App. 781, 222 S.E.2d 209 (1975) the court again stressed the importance of liberally construing the law for opening defaults, and in fact, praised the trial court for its order stating that the trial judge's order "gives the parties their 'day in court'" and "allows the case to be heard on its merits which is what our system of justice is all about.

In First National Ins. Co. v. Thain, 107 Ga. App. 100, 129 S.E.2 381 (1962), the court held that:

> "Punctuality is a virtue of high order, but truth and justice are even more exalted. Hence, the demand for punctuality in pleadings should not be so strict as to prevent inquiry into truth and to deny justice where the delinquency is reasonably excusable. Therefore, while the law makes requirements of punctuality in pleadings, it also usually makes provisions for relieving against the penalties imposed for lack of this virtue when the interests of truth and justice will require it. See also, Bass v. Doughty, 5 Ga. App. 458, 63 S.E. 516; Cobb County Fair Assoc., Inc. v. Boyle, 143 Ga. App. 754, 240 S.E.2d 143 (1977)".

B. Under the law, a proper case has been made for the opening of a default.

O.C.G.A. §15-10-34(along with O.C.G.A. §9-11-55) sets forth three separate and distinct grounds for opening a default:

1. Providential cause preventing the filing of the pleading.

2. Excusable neglect in connection with not answering.

3. The broad discretionary ground applicable when the judge determines that the facts merit opening the default.

The defendant does not contend that providential cause prevented the filing of the pleading.

1. **EXCUSABLE NEGLECT**

The defendant does not contest that the complaint was not answered because of neglect – a clerical error of which the insurance company is certainly not proud. Under the law, however, neglect is not a bar to opening a default. In fact, the term "excusable neglect" used by the statute presupposes that there is neglect of one sort or another which caused the default in the first place. If fundamental fairness dictates that the default should be opened, the courts should, and routinely do, open them.

In Powell v. Eskins, 193 Ga. App. 144, 387 S.E.2d 389 (1989), the Court of Appeals found that the trial court had abused its discretion in failing to open a default in a situation quite similar to the case at bar. In the Eskins case, the defendant had actually received the summons and complaint and delivered it to its insurer who investigated the matter for two months, but allowed the case to go into default. The court looked at the matter from the perspective of the defendant and determined that since there was reasonable ground for the defendant to believe that its insurance company was handling the matter, the "excusable neglect" standard was satisfied. Similarly, in the Cobb County Fair Associates case, (supra) the error was that of the insurer and that such error would not prevent the opening of the default particularly because the defendant reasonably relied upon its insurance company.

In each case, it should be noted that the Court of Appeals reversed the trial court and found an abuse of discretion. Certainly, in this case the facts are so similar to the cases in which the appellate court has found an abuse of discretion so that, at minimum, they support the court's exercise of discretion in favor of opening the default. See also, Sears, Roebuck & Co. v. Ramey, 170 Ga. App. 873, 318 S.E.2d 740 (1984); American Erector, Inc. v. Hanie, 157 Ga. App. 687, 278 S.E.2d 196 (1981); Pinehurst Baptist Church v. Murray, 215 Ga. App. 29, 450 S.E.2d 307 (1994); Lanier v. Foster, 133 Ga. App. 149, 210 S.E.2d 326 (1974). In each of these cited cases, the insurance company has made a clerical error and was guilty of some measure of neglect. The Court in each case found the neglect to be excusable and determined that the default should be opened as a matter of law.

**EVEN IF THE NEGLECT IS NOT DEEMED EXCUSABLE, A PROPER CASE HAS BEEN MADE FOR SETTING ASIDE THE DEFAULT.**

The third separate standard is simply that defaults may be opened when the court determines "from all the facts… that a proper case has been made for the default to be open".

The "proper case" standard is much broader than that of either providential cause or excusable neglect. It is a standard that falls within the discretion of the trial judge. D.C. Houston v. Lowe's of Savannah, 136 Ga. App. 781, 222 S.E.2d 209 (1975). Clements v. United Equity Corp., 125 Ga. App. 711, 188 S.E.2d 923 (1972).

The breadth of the rule permitting opening of a default for a "proper case" is clearly articulated in Axelroad v. Preston, 232 Ga. 836, 209 S.E.2d 178 (1974). In the Axelroad case, the Supreme Court of Georgia found that the rule governing defaults,

> "conveys very ample powers as to opening defaults"; not only providential cause, which is broad, and excusable neglect, which is still broader, but finally, as if reaching out to take in every conceivable case where injustice might result if the default is not

opened.

The key question to be answered by the court is simply, "might there be injustice if the default is not opened". In this case, the answer is most certainly yes.

Under the statute, the court must look at "all the facts". These facts must include whether the plaintiff stands to receive a judgment that is unjust. Defendant submits that certainly in this court if it is fair and just for the plaintiff to receive a judgment, the plaintiff is likely to receive it. If, however, it is not fair and just for the plaintiff to receive a judgment, it does not become just simply because the defendant is late in filing an answer.

The Court should look at the overall circumstances of this case. The plaintiff contends that a leak caused ceiling sheetrock to deteriorate and that the sheetrock fell and hit her in the head. The leak and the deterioration of the sheetrock was within plaintiff's own apartment and was caused when she flushed something down the toiler and caused it to become stopped. The Atlanta Housing Authority had inspected the property the day before and had found no problems or defects.

It is highly unlikely that the plaintiff can show that the defendant had notice of the claimed danger and an opportunity to correct it.

There is no evidence at all that the defendant had superior knowledge of the dangerous condition – the plaintiff herself had actual knowledge of the problems and there is even some question as to whether the plaintiff was actually hit in the head with the sheetrock in the first instance.

"All the facts" as contemplated by the code section mean more than simply the facts of why the case went into default. Under the case law, the court must ask itself whether letting the default stand "<u>might</u> result in injustice". Without being presumptuous, defendant submits that not only might injustice result, but clearly injustice will result if this case is not tried on the merits. Accordingly, defendant submits that the default should be opened.

Respectfully submitted this ____ day of February, 2004.

DUNCAN & MANGIAFICO, P.C.

BY:_____
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**CERTIFICATE OF SERVICE**

This is to certify that I have this date served counsel for all parties to this action with a copy of **BRIEF IN SUPPORT OF MOTION TO SET ASIDE DEFAULT** by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon and addressed as follows:

Jack O. Morse, Esq.
Attorney at Law
191 Cleveland Avenue
Atlanta, GA 30315

This _____ day of February, 2004.

DUNCAN & MANGIAFICO, P.C.

BY:_____
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