

Sumner employee responsible for managing the subject property. Now Plaintiff seeks to add Austin Sumner as an “owner or occupier” of the property under OCGA § 51-3-1. *Stelly v. WSE Prop. Mgmt., LLC*, 350 Ga. App. 627, 630 (2019).

Kroger and Battle Ridge object to the addition of Austin Sumner, arguing that the statute of limitation expired on March 11, 2021, which was two years after the initial injury. However, Plaintiff argues that her claim against Austin Sumner is timely, and the statute of limitation does not expire until July 12, 2021.

The Supreme Court’s first emergency order entered on March 14, 2020, “suspend[ed], toll[ed], extend[ed], and otherwise grant[ed] relief from any deadlines or other time schedules or filing requirements imposed by otherwise applicable statutes . . . including, but not limited to any: (1) statute of limitation[.]” On April 6, 2020, the Georgia Supreme Court provided “Guidance on Tolling Statutes of Limitation Under the Chief Justice’s Order Declaring Statewide Judicial Emergency” in response to “[q]uestions [that] have arisen about how the tolling provision in the Chief Justice’s Order of March 14, 2020, Declaring Statewide Judicial Emergency applies to statutes of limitation.” The guidance gave examples of how the tolling works. In pertinent part, the Supreme Court stated that

[i]f the period of limitation for a particular cause of action commenced prior to March 14, 2020—that is, if the “clock had started to run before the entry of the Chief Justice’s order—the running of the period of limitation was suspended on March 14, and the running of the period will resume when the tolling provision of the March 14 declaration has expired or is otherwise terminated . . . whatever time remained in the period of limitation as of March 14 will still remain when the tolling provision of the March 14 declaration has expired or is otherwise terminated.

Because the “clock” on her cause of action started before March 14, 2020, the limitation period was suspended until July 14, 2020, when the tolling provision of the initial emergency order was terminated.¹ Based on the Supreme Court’s example, Plaintiff’s claim against Austin Sumner is not time barred.

OCGA § 9-11-15 (a) allows a party to amend his pleading as a matter of right at any time before the entry of a pretrial order. But, when a party wishes to add or drop a party by amendment, “[OCGA § 9-11-15 (a)] must be read in pari materia with [OCGA § 9-11-21], which allows the dropping and adding of parties only by order of the court on motion of any party.” *Riding v. Ellis*, 297 Ga. App. 740, 742 (2009). O.C.G.A. § 9-11-21 provides that “[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” Adding a party is within the trial court’s discretion, and “[f]actors to be considered include whether the new party will be prejudiced thereby and whether the movant has some excuse or justification for having failed to name and serve the new party previously.” *Dean v. Hunt*, 273 Ga. App. 552, 552-553 (2005) (citations and internal punctuation omitted). On these issues, Plaintiff has the burden of persuasion. *Id.* at 553.

As the property manager to the subject property, Austin Sumner has had knowledge of the underlying incident and this lawsuit since 2019. No one appears to dispute that fact. While Kroger and Battle Ridge argue that Austin Sumner would be prejudiced because discovery and depositions have taken place without Austin Sumner’s presence or participation, the Court finds that argument unpersuasive. The

¹ The Georgia Supreme Court’s Fourth Order Extending Declaration of Statewide Judicial Emergency § II (10) provides that “[t]he 122 days between March 14 and July 14, 2020, or any portion of that period in which a statute of limitation would have run, shall be excluded from the calculation of that statute of limitation.”

evidence suggests that Austin Sumner has participated already, at least to some extent, in discovery. (See, Battle Ridge Verification to Interrogatory Responses; Austin Sumner Responses to Non-Party Requests; Deposition of Stacy Smith; Battle Ridge's Responses and Objections to 30(b)(6) Notice.) As stated previously, Austin Sumner is the property manager for the property; Austin Sumner knew of the underlying incident because one of its responsibilities is the investigate claims on the property; and Austin Sumner has known of this litigation since its inception. Based on the above, the Court finds that Austin Sumner will not be prejudiced by being added as a party defendant, and Kroger and Battle Ridge's arguments to the contrary are unavailing.

Kroger and Battle Ridge contend that Plaintiff has not provided a valid excuse for seeking to add Austin Sumner as a party defendant because they informed Plaintiff as early as November 2019 that Austin Sumner was the property manager over the property. While Plaintiff acknowledges that "[she] has known that Austin Sumner was the property manager, [she] just learned in depositions two days ago that [Austin Sumner] may be an occupier owing Plaintiff a statutory duty under Georgia law." (Pl's Br. at 2.) Plaintiff deposed Stacy Smith, an Austin Sumner employee, in May 2021. It appears that based on that deposition, Plaintiff confirmed Kroger and Battle Ridge's discovery disclosure and now believes that Austin Sumner may be an "occupier" since they exercise "custody and control" of the subject premises. OCGA § 51-3-1. Moreover, Plaintiff states that due to scheduling difficulties of the parties, witnesses, and counsel, as well as the challenges posed by COVID-19, that there exists "some excuse or justification" for adding Austin Sumner

at this time. *Cf., Riding, supra*, (finding that the plaintiff's excuse that he was not a lawyer and did not know what needed to be done failed to provide a sufficient excuse in his amendment).

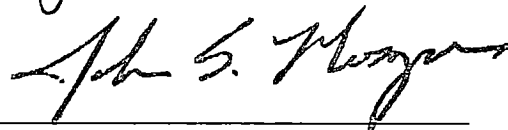
Kroger and Battle Ridge cite to *Maitlen v. Derst*, 178 Ga. App. 305, 306 (1986) as controlling authority for disallowing the addition of Austin Sumner. However, that case is quite different from the facts here. In *Maitlen*, "the suit had been pending and active for over seven years and the party to be added knew of it (as did the party seeking her addition), and as the new party was asserting an independent claim and offered no justification for delaying entry into the lawsuit, the court was authorized in its discretion to disallow it." *Id.* Here, this suit has been active for two years, which is a far cry from seven years. Where as in *Maitlen* there was no justification offered for adding a new party that had known of the suit for seven years, in our case, Plaintiff has offered some excuse for adding Austin Sumner, who has known of the suit for two years.

"It should be particularly noted, however, that while laches and unexcused delay may bar a proposed amendment, the mere fact that an amendment is offered late in the case is not enough to bar it if the other party is not prejudiced." *Dover Place Apartments v. A & M Plumbing & Heating Co.*, 167 Ga. App. 732 (1983). "Laches requires more than the passage of time; laches also requires prejudice arising from that passage of time[.]" *Fontaine v. Home Depot*, 250 Ga. App. 223, 226 (2005). Plaintiff seeks to add Austin Sumner within the two year statute of limitations. See *Parks v. Hyundai Motor America, Inc.*, 258 Ga. App. 876, 883 (2002) (thirteen-month delay); *Little Tree, Inc. v. Fields*, 240 Ga. App. 12, 13-14 (1) (1999) (eighteen-

month delay); *Shiver v. Norfolk-Southern Ry. Co.*, 220 Ga. App. 483, 485 (1996) (three-year delay).

In sum, the Court finds that Austin Sumner will not be prejudiced, and Plaintiff has provided some excuse or justification for failing to name and serve Austin Sumner earlier. Accordingly, Plaintiff's Motion to Add Austin Sumner Properties, LLC as a Party Defendant is **GRANTED**. Plaintiff may file an amended complaint adding Austin Sumner Properties, LLC as a defendant within seven days of the date of this Order.

SO ORDERED this, the 1st of July, 2021.



JOHN S. MORGAN, JUDGE
STATE COURT OF COBB COUNTY

Certificate of Service

I certify that I have on this date served a true and correct copy of the foregoing Order to all parties and/or their attorney of record by electronically filing the foregoing document using the Cobb County PeachCourt system. I further certify that the foregoing document was served upon the following person(s) via the Cobb County PeachCourt system:

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This, the 1st day of July, 2021.



Allison Schnatmeier, Judicial Administrative Specialist
to Judge John S. Morgan, State Court of Cobb County