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Chapter 2:
Landlord / Tenant

CHAPTER 2 - LANDLORD-TENANT

2. LANDLORD/TENANT

2.1 TYPES OF LANDLORD-TENANT RELATIONSHIPS

2.11 Contracts - Oral and Written

A. Statute of Frauds:

1. An oral contract between a landlord and tenant is valid if the time does not exceed one year [OCGA 44-7-2(a)].
2. If the rental period exceeds one year, the contract must be in writing or the Statute of Frauds is violated [OCGA 44-7-2(a)] (see **2.12**B2).

B. Other restrictions on terms in **residential** leases [OCGA 44-7-2]:

1. No waiver of obligation of landlord to repair and responsibility of landlord for damages caused by failure to repair or defective construction [OCGA 44-7-13, -14; *see* OCGA 13-8-2 (prohibiting contracts to indemnify against claims for own sole negligence in construction, maintenance of building)].

NOTE - An exculpatory or indemnity clause attempting to **avoid the landlord's liability for negligence**, especially the liability for defects in construction, is **void** as against public policy in **both** commercial and residential leases. [246 Ga. 443, 271 SE2d 841 (1980); 163 Ga. App. 790, 294 SE2d 619 (1982), aff'd 250 Ga. 628, 301 SE2d 647 (1983); but see 222 App. 27, 473 SE2d 569 (1996) (approving a commercial lease provision requiring tenant to obtain insurance for property damages and waiving such damages); OCGA. 13-8-2 (allowing contracts requiring obtaining insurance)]. Of course, in a **commercial** lease the contract may provide for the tenant to repair.

2. No waiver of compliance with dispossessory or distress procedures permitted or provisions governing security deposits.
3. No waiver of housing code ordinances [O.C.G.A. 36-61-11].
4. No attorney's fee provision unless reciprocal.

2.12 Tenancy at Will

A. Definition:

Any rental agreement with no set date of termination is a tenancy at will [OCGA 44-7-6].

B. Tenancy at Will Arises:

1. When no provision for the termination of the lease is included in the contract [OCGA 44-7-6];
2. When there is a deficiency in the lease such as:
   a. Lack of authority in the execution of a lease [146 App. 871, 247 SE2d 494 (1978); 117 App. 475, 161 SE2d 71 (1968)];

   OR

   b. The lease lacks mutuality [117 App. 475(2), 161 SE2d 71 (1968)];

   OR

   c. The lease is violative of the Statute of Frauds [175 Ga. App. 676, 332 SE2d 331 (1985)].

   In the above situations, the tenant in possession is deemed to be a tenant at will.

C. Implied terms of contract:

1. Rental at current rate of payment continues until either the landlord gives sixty days notice to the tenant (to terminate **or** change rent) or the tenant gives thirty days notice to the landlord to terminate the lease.
2. In the absence of any agreement as to payment of rent, ***an obligation to pay*** a fair and reasonable ***rent is implied from occupation of the premises*** by the tenant [OCGA 44-7-5; 89 App. 129(3), 78 SE2d 826 (1953)].

2.13 Tenant at Sufferance

A. Definition:

A tenancy at sufferance arises when one comes into possession of land by lawful right, whether as a tenant or otherwise, but wrongfully remains in possession [216 Ga. 816, 819, 120 SE2d 183 (1961)].

NOTE - After the bank conducts a sale under power (i.e., forecloses) due to default on a deed to secure debt, the prior owner is a tenant at sufferance and may be dispossessed [168 App. 112 (2), 308 SE2d 388 (1983)].

B. A Tenancy at Sufferance Cannot be Created by Contract:

1. A tenancy at sufferance may not be expressly created by an agreement since the very essence of such a tenancy involves the absence of consent or agreement by the landlord [Dawkins, Georgia Landlord and Tenant Breach and Remedies, § 5-6, p. 57].
2. However, the parties could agree that upon the occurrence of a certain contingency, the tenant's status is that of a tenant at sufferance [Dawkins, Georgia Landlord and Tenant Breach and Remedies, § 5-6, p. 57].

C. Tenant at Sufferance is also liable for reasonable rental for period of occupancy [170 App. 867, 318 SE2d 674 (1984)] (but if landlord accepts rent will create tenancy at will - see **2.14**C); i.e., landlord can sue for rent, but can't accept voluntarily and then dispossess.

2.14 Tenant Holding Over

A. Definition:

1. A tenant holding over is a tenant who holds possession of the property over and beyond the term for which the premises were rented or leased to the tenant [OCGA 44-7-50].
2. In the absence of the landlord's consent, or a contractual agreement to the contrary, **a tenant holding over is considered a tenant at sufferance** [77 App. 131, 48 SE2d 387 (1948); 140 Ga. 750, 79 SE 842 (1913)].

B. When it arises:

A tenant holding over occurs when:

1. The lease or rental agreement expires [145 App. 325, 243 SE2d 526 (1978)];

OR

2. The landlord terminates lease because the tenant has breached the contract [122 App. 815(1), 178 SE2d 766 (1970); 146 App. 374, 246 SE2d 406 (1978)].

C. When a Tenant Holding Over or At Sufferance Becomes a Tenant at Will:

A tenant at sufferance becomes a tenant at will if the landlord consents to his/her remaining in the property, including when the landlord demands or accepts rent or commits any other affirmative action which would give rise to the inference that landlord has given permission for the tenant to remain in possession [118 Ga. 906, 909, 45 S.E. 794 (1903); 164 App. 203(3), 296 SE2d 756 (1982); but see 221 App. 856, 860, 473 SE2d 544 (1996)]. If the landlord receives rent and does not wish to create a tenancy at will, he/she must promptly return it to the tenant. The tenancy at will continues "the ***general terms*** and conditions of the lease" [280 App. 406, 634 SE2d 162 (2006) (does not include right of first refusal to purchase or re-lease property at expiration)].

NOTE - Accepting rent **after** filing dispossessory for **holding over** will not by itself create tenancy at will or stop landlord from obtaining writ [154 Ga. 581 (1922); 167 App. 786, 307 SE2d 687 (1983)]. However, accepting rent after filing a dispossessory for **non-payment** of rent can be fatal to the claim (see also **2.33**B).

2.15 Citations: STATUTES

Estate for years does not create landlord tenant relationship [OCGA 44-6-101].
Lease of less than 5 years does not create estate for years unless contract provides to the contrary [OCGA 44-7-1].
Rental contract must name someone to receive notices and lawsuits; if not, the tenant may serve the person signing the contract [OCGA 44-7-3].
Tenant cannot generally sublease without consent of landlord [OCGA 44-7-1].

Citations: CASES

Assignment provision - where written consent is required for assignment, landlord ***need not have reason*** for withholding consent unless lease provides consent cannot be unreasonably withheld [270 App. 90, 606 SE2d 13 (2004)].
Cancellation - time of the essence - in cancelling lease, inadvertent failure to enclose required cancellation fee with initial notice of cancellation made notice ineffective where lease provided “time is of the essence” [286 App. 673, 649 SE2d 733 (2007)].
Cooperative housing association (where members own stock in cooperative which owns property) may bring dispossessory for failure to pay maintenance fees against member/stockholder [213 App. 218, 444 SE2d 112 (1994)].
Early notice - Notice which is untimely due to being too early may be OK [221 App. 856, 473 SE2d 544 (1996)].
Family tenancy - landlord-tenant relationship between landowner and sister occupant where no written lease, no rent paid, landowner retains key, stores personal property there, and lives in adjacent structure on same property [287 App. 483, 651 SE2d 810 (2007)]. Landlord not responsible for tenant’s negligence as a landlord not in possession.
Gratuitous tenancy "until the second coming of Christ" was a tenancy at will, and landlord was entitled to rent upon 60 days notice [232 App. 415, 501 SE2d 846 (1998)]. Gratuitous tenant permitted to bolt portable building to ground at city airport was tenant at will [278 App. 149, 628 SE2d 117 (2006)].
Guarantor for lease liable for any extensions pursuant to the terms of the lease, including extension of lease by holding over, where guarantee provides it terminates only upon full payment of all sums reserved under the lease [269 App. 249, 603 SE2d 756 (2004)].
Implied covenant - all leases have an implied covenant of good faith and fair dealing - when tenant’s use of property requires zoning variance which expires during lease, landlord required to apply for extension despite contract provision requiring tenant to cease any non-conforming use under zoning laws. Interpretation of requirement of fair dealing is question of

law for court [291 App. 808, 662 SE2d 745 (2008)].

Lease violating statute of frauds was enforceable where tenant accepted benefits under lease (condemnation award for putative 5-year period of lease) [218 App. 446, 462 SE2d 378 (1995)].

Lease-purchase - failure to pay rent voids option to purchase, even where valuable improvements are made [288 App. 868, 655 SE2d 644 (2007)].

Market rent - a right to ***renew*** at "market rate" or at greater of market rate and a fixed sum is void for vagueness and is unenforceable [250 Ga. App. 513, 551 SE2d 102 (2001)]; but see OCGA 44-7-5 obligation to pay fair and reasonable rent is implied from occupation of the premises by the tenant.

Renewal of lease - If the landlord accepts rent from **tenant holding over**, the lease becomes a tenancy at will with the same "general terms and conditions" as the lease that expired [190 App. 238, 378 SE2d 411 (1989); where **agreement** see 260 Ga. 533, 397 SE2d 692 (1990)].

Subtenants - Tenant has no right to impose sub-tenant on landlord [144 App. 464, 241 SE2d 582 (1978)]. Landlord may by affirmative act treat subtenant as his own tenant and be estopped from contesting validity of assignment [143 App. 413, 238 SE2d 560 (1977)]. Where landlord accepts subtenant, primary tenant may not effectively terminate lease prior to expiration of subtenant's lease and its vacation of the property [290 App. 281, 659 SE2d 700 (2008)].

Technical words - in commercial lease, technical terms used in commercial real estate may be explained by parole evidence [289 App. 315, 656 SE2d 922 (2008) (master lease)].

2.2 USE OF DISPOSSESSORY PROCESS

2.21 CHECKLIST

1. Is property located in your county? If not, transfer case to proper county.

2. Is action prosecuted by legal entity (not just XYZ Apartments)? If not, then pleadings should be amended to state name of legal entity.

3. Has warrant been properly served (tack and mail **only** after attempting personal service) (see **2.26**)?

4. Was an answer timely filed within seven days of service?
If not, issue default judgment for writ of possession and amount claimed if served personally or sui juris. Issue only writ of possession if tack and mail service (see **2.4**).

5. Is any appropriate party attempting to intervene (see **1.23-4**)**?**

6. If answer has been filed, and no party is appearing to contest proceeding, issue default judgment for writ and amount originally properly claimed in warrant (see **2.4**).

7. <OPTIONAL: At call of the calendar you may wish to allow Plaintiffs to indicate if they believe no legal defense has been raised>.

8. <OPTIONAL - May allow landlord to amend his/her complaint to claim rent coming due since warrant was filed if no prejudice to tenant and tenant is present in court>.

9. If case to be continued beyond seven days from date of answer, require payment of rent into court (see **2.51**).

10. Examine answer. If no legal defense or counterclaim (see below) has been raised, then verify absence of legal defense and prepare judgment (see **2.53**). If counterclaim beyond jurisdiction of court (see **1.11**), then transfer case.

11. Trial - Landlord must show:
    a. Existence of landlord-tenant relationship;
    b. Grounds for dispossession:
        - non-payment of rent;
        - that tenant is holding over past the termination of the lease (see **2.14**),

          OR
        - that tenant is in possession at sufferance (see **2.13**);
    c. If challenged in answer, that demand for possession was made (if not in answer, burden on tenant to rebut notice) (see **2.24**C).

12. Consider defenses (see **2.33**). Lack of money no defense unless federal housing involved, but failure of landlord to repair will require consideration of counterclaim for diminution in value of leased premises.

13. If federal housing program involved, consider special defenses (see **2.34**).

14. Consider counterclaims (see **2.35**) - if no defense to dispossessory, and counterclaim does not exceed amount of rent due at filing of warrant, then issue writ of possession and reduce money judgment by any amount allowed on counterclaim. Otherwise, issue judgment for Defendant for net amount due.

15. Enter judgment (see **2.53**). Execution of writ in non-default cases is stayed for seven (7) days.

16. If appealed, enter order for payment of rent into court and forward record to appropriate court (see **2.54**).

2.22 DISPOSSESSORY DIALOGUE

LADIES AND GENTLEMEN, this is the dispossessory calendar for the Magistrate Court of _____ County. My name is _____ and I am <the chief> <a> judge of this court. In the cases on this calendar, the Landlord has filed an action for possession of his/her property, and usually also for unpaid rent, and the Tenant has filed an answer with the court.

> NOTE - If you do not wish to use a dialogue at the beginning of a separate dispossessory calendar, you can use language from the following two paragraphs to explain your rulings in these common situations.

An answer which states that the tenant did not have the money to pay the rent, due to loss of a job, sickness, or some other unfortunate occurrence, is not legally sufficient to prevent an eviction. The court certainly has sympathy for such unfortunate situations, but economic hardship is no defense under the laws of this State because such matters are not the fault of the landlord. Further, although a landlord's failure to keep the premises in good repair may well be relevant to your case, in most instances a landlord's failure to make repairs does not fully relieve a tenant from his or her responsibility to pay the rent, since the tenant's obligation to pay rent is considered separate or independent from the landlord's obligation to keep the premises in good repair.

For those who are present in court today to contest their cases, if the court does issue a writ of possession against you, that means that you will have to vacate the property within seven days. This seven day grace period has been set by the legislature and the court cannot vary it. If you do not vacate the property, the <sheriff> <marshal> <constable> will be forced to put your belongings out on the street.

As I now call the calendar, please respond when you hear your name or you will lose your case by default.

> NOTE - Magistrate court formerly had discretion in delaying the execution of the writ of possessions to allow the tenant time to move out [OCGA 15-10-46]. Currently, the legislature provides for a seven day stay in execution of the judgment and writ of possession in contested cases and an immediate judgment and writ if no answer is filed. [OCGA 44-7-55(a), -53(a)]. Presumably, if defendant fails to appear and the answer is stricken, an immediate writ would be in order.

2.23 Required Procedure

A. Purpose of proceeding - primarily used for recovery of possession of the land [53 App. 282, 185 S.E. 580 (1936)].

B. Landlord may legally remove a tenant and his/her property from rented premises only under the dispossessory procedure set forth in OCGA 44-7-50 et seq.

C. **Self-help action** by landlords without dispossessory **is a tort** for which tenant may recover damages [51 App. 669, 181 S.E. 425 (1935); 135 App. 321, 217 SE2d 498 (1975); 218 App. 160, 460 SE2d 835 (1995)] and **cutting off utilities is a misdemeanor** [OCGA 44-7-14.1]. Alternatives to the dispossessory process may be permitted by contract for **non-residential rentals** [147 App. 493, 249 SE2d 310 (1978); 212 App. 69, 443 SE2d 12 (1994)].

D. Citations: STATUTES

Hotels, inns, and boarding houses not required to file dispossessory [see OCGA 43-21-3.1].
Mobile Home Removal [OCGA 44-7-59].
Self-storage units - landlord has statutory lien on property in self-storage unit which may be enforced without judicial process after 30-day default in rent payment and notice mailed to tenant [OCGA 10-4-210 et seq.]. Landlord may have additional rights to reenter property and sell goods under the contract [209 App. 809, 434 SE2d 798 (1993)].

E. Citations: CASES

Cooperative housing association (where members own stock in cooperative which owns property) may bring dispossessory for failure to pay maintenance fees against member/stockholder [213 App. 218, 444 SE2d 112 (1994)].

Criminal trespass action not intended to be used where occupant gained possession lawfully and thereafter held over without right [147 App. 107, 248 SE2d 181 (1978)].

Dispossessory is required procedure unless property is abandoned, and duty cannot be delegated to independent contractor [218 App. 160, 460 SE2d 835 (1995)].

Mobile home "self-help" removal from rented lot without dispossessory was allowed in case prior to effective date of OCGA 44-7-59 [185 App. 876, 366 SE2d 236 (1988)].

Mobile home defects - where third party provides mobile home in code violation (lack of smoke detector), this is no defense to dispossessory by owner of real estate [236 App. 858, 513 SE2d 771 (1999)].

Non-residential leases - Contract provision allowing "self-help" action for storage rental unit was OK [147 App. 495, 249 SE2d 310 (1978)]. Contract provision authorized landlord to reenter restaurant, change locks, and relet it without dispossessory process [212 App. 69; 441 SE2d 417 (1994)].

Personal property left after early termination may not be treated as abandoned without contract authorization [*Compare* 181 Ga. 337, 182 SE2d 502 (1935) *with* 196 App. 331, 396 SE2d 62 (1990)].

Proper parties to dispossessory warrant only landlord and tenant [178 Ga. App. 798, 800(4), 344 SE2d 507 (1986); 60 App. 674 (2), 4 SE2d 689 (1939); 110 Ga. 41(1), 35 SE 291 (1900); see 235 App. 705, 509 SE2d 662 (1998)].

Remedy not available for tenant's violation of a covenant not to sublet [26 App. 330, 106 SE2d 190 (1921)].

Rooming house renting room by week may be landlord required to use dispossessory [88 App. 364, 76 SE2d 729 (1953)].

2.24 When Landlord May File

A. Landlord/Tenant relationship must exist before any dispossessory proceeding may be brought [167 App. 687(5), 307 SE2d 507 (1983); 132 App. 155(1), 207 SE2d 653 (1974); 198 App. 347, 401 SE2d 569 (1991); compare OCGA 44-7-9 (tenant who attorns to (e.g., pays rent to) landlord cannot challenge Landlord's title) with 236 Ga. App. 177, 511 SE2d 280 (1999) (loss of title subsequent to tenancy allows defense of lack of landlord-tenant relationship)].

B. Grounds for Dispossession:

1. Holding over;
2. Non-payment of rent;
3. Tenant at Will;
4. Tenant at Sufferance [OCGA 44-7-50].

C. Demand for Possession by Landlord:

1. A demand for possession must be made before a dispossessory warrant may be filed (see **2.25**B). The demand may be verbal or in writing [OCGA 44-7-50].
2. An agreement by a tenant to vacate the premises does not eliminate the necessity of demanding possession [75 App. 155(1), 42 SE2d 505 (1947)].
3. It is not necessary to prove demand for possession where it appears that if the demand were made it would be refused [168 App. 112, 308 SE2d 388 (1983); 175 App. 676, 332 SE2d 331 (1985)].

4. Time demand must be made:
   a. If the proceeding is based on holding over, the demand must be made either upon or **after** termination of the lease and **prior** to the commencement of the proceeding [146 App. 374, 246 SE2d 406 (1978), 145 App. 325, 326, 243 SE2d 526 (1978)] - can't terminate lease in the future and make demand at same time.
   b. If the proceeding is based on nonpayment of rent, the demand must occur after the due date of the rent and **before** the commencement of the proceedings [247 Ga. 625, 278 SE2d 643 (1981)].
   c. No delay is required after demand before filing suit [OCGA 44-7-50].
5. Landlord need not prove demand at trial if allegation of demand in complaint is not denied in the answer. However, tenant may still raise and prove this defense at trial even if not raised in answer (see **2.33**G). If raised in answer, landlord has burden; if at trial, tenant has burden.

D. Jurisdictional Amount - no limitation as to amount in issue [OCGA 15-10-2(b); 237 App. 415(1), 514 SE2d 216 (1999)].

E. County of filing - must be where property located, filing in wrong county has been called lack of **subject-matter jurisdiction** [175 App. 144, 145, 333 SE2d 14 (1985)].

F. Rent claims:

1. Landlord must include all accrued rent claims, even where previously pending separate contract suit seeks rent - otherwise, final judgment in dispossessory, such as writ of possession will bar accrued rent claims as *res judicata* [237 App. 415, 514 SE2d 216 (1999)].
   - At trial, court may allow rent accrued during lawsuit if tenant present (see **2.53** note).
   - Where service is by "tack and mail" and defendant does not answer, no jurisdiction to enter money judgment results in no *res judicata* as to rent and other money claims [OCGA 44-7-51(c); 275 App. 143; 619 SE2d 814 (2005)].
2. Landlord cannot seek damages for future rents which have not accrued; future rents may be collected in separate action [262 App. 770, 556 SE2d 442 (2003)].

G. Citations: CASES

A demand by a landlord on a subtenant, but not on the tenant, is not sufficient [174 App. 224(3), 329 SE2d 561 (1985)].

Corporate shareholder who paid rent to corporation as tenant at will cannot claim ownership interest in property in dispossessory [236 App. 371, 511 SE2d 892 (1999); OCGA 44-7-9, -50].

Demand for possession must be unequivocal, so certain tenant cannot reasonably misunderstand it [131 App. 489, 206 SE2d 115 (1974)]. A demand to pay or be removed under a dispossessory warrant is sufficiently clear [136 App. 365, 221 SE2d 207 (1975)].

Landlord's title - Tenant cannot normally challenge landlord's title [OCGA 44-7-9, -50], but if tenant claims ownership interest that can be a denial of landlord-tenant relationship which is good defense [200 App. 592, 409 SE2d 71 (1991); 194 App. 693, 392 SE2d 15 (1990)]. No jurisdictional problem raised thereby. Where landlord loses title to property after beginning of tenancy and prior to dispossessory, tenant may defend on basis that landlord-tenant relationship no longer exists [236 App. 177, 511 SE2d 280 (1999)]. On the other hand, where property is purchased at foreclosure and the deed under power of sale has not been set aside, the landlord's title cannot be attacked in the course of the dispossessory [223 App. 501, 478 SE2d 611 (1996); 205 App. 586, 423 SE2d 283 (1992); 156 App. 114, 274 SE2d 34 (1980)]. Similarly, for IRS tax sale [241 App. 379 527 SE2d 212 (1999)]; no collateral attack in dispossessory on sale to land trust, converting occupant from owner to tenant [277 App. 130, 625 SE2d 523 (2006) (based on "interference" with relation between Price and security deed holder)].

NOTE - The cases in this area, where the tenant claims some sort of equitable interest in the property, are difficult to reconcile [compare 200 App. 592, 409 SE2d 71 (1991) with 205 App. 586, 423 SE2d 283 (1992)] and the magistrate should proceed with caution. Where a tenant has been paying ***rent*** to the landlord, however, the ownership claim should probably be ignored in the dispossessory [236 App. 371, 511 SE2d 892 (1999)], except where the landlord lost title after the tenant started paying rent [236 App. 177, 511 SE2d 280 (1999)]. Likewise, where the Landlord has legal title, such as after a foreclosure, and the tenant does not file a counterclaim seeking to set aside the legal title (which, if valid, would require transfer to a court with subject-matter jurisdiction), then the magistrate is probably safe to proceed with the dispossessory. A defendant desiring to challenge the foreclosure, should, in the interest of caution, file an action to set the sale aside in Superior Court and seek to enjoin the magistrate court proceeding.

2.25 Form of Complaint

A. Grounds for Dispossession in Complaint:

1. The affidavit must set forth at least one ground unequivocally and with clarity.
2. Use of "or" or "and/or" in affidavit is improper - the affidavit is defective if multiple grounds in the disjunctive are pled [146 App. 157(2), 246 SE2d 1 (1978); 202 Ga. 107, 42 SE2d 446 (1947)].
3. Such an affidavit in the disjunctive may be amended by striking all but one of the grounds and proceeding on one remaining ground [145 App. 340(1), 243 SE2d 721 (1978); 202 Ga. 107, 111, 42 SE2d 446 (1947)].
4. May claim alternate grounds to dispossess using "and" - may assert multiple grounds separately and positively (using "and") [145 App. 340(1), 243 SE2d 721 (1978)].

B. The affidavit must allege that the landlord has made a demand for possession [OCGA 44-7-50; 202 Ga. 107, 109, 42 SE2d 656 (1947)].

C. Must be under oath:

The affidavit must be sworn in front of a judge or a clerk of the court in the district in which the land lies. The oath may be given before a notary public only if approved by a judge or by a clerk of the court pursuant to local rules adopted by the court [OCGA 44-7-50, 18-4-61; 175 App. 144, 333 SE2d 14 (1985)].

D. Other claims by the landlord may be included with dispossessory complaint if related to landlord-tenant relationship, such as utilities, late fees, or attorney fees.

NOTE - Contract provisions for attorney's fees in connection with leases of property used as a dwelling must be recoverable by either side or are void [OCGA 44-7-2(c)]. Must also make demand warning defendants that they have 10 days to pay and avoid attorney fees [OCGA 13-1-11; 194 App. 840(3), 392 SE2d 37 (1990); 219 App. 858, 467 SE2d 197 (1996)].

E. When defects amendable:

1. The affidavit is amendable to the same extent as ordinary petitions [OCGA 9-10-130; see 149 App. 112(1), 253 SE2d 458 (1979)].
2. The right to amend is given broad and liberal construction [74 App. 688, 41 SE2d 391 (1947)].
3. Amendment must be under oath [141 App. 51(2), 232 SE2d 391 (1977)].
4. If a landlord seeks only possession, and not a monetary judgment, the issuance of a writ is a final judgment and the affidavit may not thereafter be amended [153 App. 825, 266 SE2d 574 (1980); see also 164 App. 206(2), 297 SE2d 83 (1982)].

2.26 Summons and Service

A. Summons:

1. Issued by judge or clerk after filing of affidavit by landlord [OCGA 44-7-51(a)];
2. The summons must contain:
   a. a command to appear at a hearing on a certain day [132 App. 794, 209 SE2d 243 (1974)];

   AND

   b. the last possible day to answer stated with certainty on the summons [OCGA 44-7-51(a)].
3. A clerical mistake on the summons is an irregularity which may be cured by amendment [6 App. 738(3), 65 S.E. 697 (1909)].

B. Service:

1. **PERSONAL SERVICE** on the tenant of the affidavit and summons **must be attempted** [OCGA 44-7-51(a)].
2. **SUI JURIS** - If the sheriff (or marshal or constable) is unable to personally serve the tenant, the sheriff may serve the summons and affidavit to any person residing sui juris (of suitable age and discretion) on the premises.

NOTE - **MONEY JUDGMENT** requires personal service, "sui juris" service [OCGA 15-10-43(b), 44-7-51(c)] or answer by Defendant [250 Ga. 109, 296 SE2d 558 (1982)].

3. **TACKING** - **If personal service cannot be perfected** on a tenant or someone residing sui juris on the premises, the summons and affidavit may be posted on the door of the premises.

AND

MAILING - On the same day of posting, the officer of the court must enclose, direct, stamp and mail by first class mail a copy of the summons and affidavit to the tenant at his/her last known address, if any, and make an entry of the mailing on the affidavit [OCGA 44-7-51(a)].

C. Citations: CASES

A tenant cannot make a special appearance contesting the writ of possession but challenging the jurisdiction of the court to issue a money judgment [250 Ga. 109, 296 SE2d 558 (1982)].

"Tack and mail" service may constitutionally by used where reasonably calculated to give notice [233 Ga. 208, 211, 210 SE2d 722 (1974)]. Where a corporate tenant was using warehouse space to store and repair merchandise and personal service was possible, "tack and mail" service invalid - writ of possession was set aside and tenant recovered large sum for wrongful dispossession [142 App. 722, 236 SE2d 854 (1977)]. However, where landlord reasonably believes premises have been abandoned, pursuing a dispossessory with "tack and mail" service is proper [233 Ga. 208, 210 SE2D 722 (1974)].

2.3 RESPONSES BY TENANT

2.31 Form and Time of Answer

A. Form of Answer:

1. The answer may be either oral or in writing [OCGA 44-7-51(b)].
2. If the answer is oral, the substance shall be endorsed on the dispossessory affidavit by the court or clerk.
3. Answers receive **very liberal construction** [146 App. 786(2), 247 SE2d 597 (1978) (answer need not even be signed); 241 Ga. 218, 244 SE2d 862 (1978); 223 App. 501, 478 SE2d 611 (1996)]. If the tenant has filed any response, an amended answer should be allowed at trial although Plaintiff may be entitled to a continuance with payment of rent into court if defense is a surprise.

B. Answer must be made within 7 days of actual service.

1. Answer does not need to be verified [177 App. 576, 340 SE2d 233 (1986)] or signed [146 App. 786(2), 247 SE2d 597 (1978)].
2. Failure to answer results in immediate judgment [OCGA 44-7-53(a)] (see **2.4**) - ***even improper parties not in possession of property must answer within 7 days or receive default judgment*** [235 Ga. App. 705, 509 SE2d 662 (1998)] (see **2.33I** on defense of improper parties for non-tenants (e.g., guarantors)).

NOTE - NORMAL RULES ON OPENING DEFAULTS DO NOT APPLY TO DISPOSSESSORIES [OCGA 44-7-53(a), 172 App. 674, 324 SE2d 532 (1984)]. Court unauthorized to open default where no answer was made within the statutorily prescribed time [172 App. 674, 324 SE2d 532 (1984); 198 App. 816, 403 SE2d 97 (1991) (magistrate court)]. These cases concerned the discretionary grounds for opening default (see **1.35**), not the legal grounds for setting aside judgments provided under OCGA 9-11-60 (see **1.6**)].

C. Counterclaims (see **2.35**).

2.32 Jurisdiction to Consider Answer and Counterclaims

A. If answer requires affirmative equitable relief, magistrate has no jurisdiction [1983 GA. CONST. Art. 6, §4, ¶1] (see **1.11**C). May consider denial of tenancy through ownership of property where no equitable relief required [194 App. 693, 392 SE2d 15 (1990); 200 App. 592, 409 SE2d 71 (1991) (title to land is collateral to case)].

B. Magistrate shall consider any equitable claim raised solely to defeat Plaintiff's claim and defeat money judgment even though equitable claims are involved [270 App. 93, 206 SE2d 112 (2004) (equitable defenses to dispossessory); 156 App. 513, 274 SE2d 850 (1980); *see* 228 Ga. 448, 450(3), 186 SE2d 94 (1971), *but see* 123 App. 796, 182 SE2d 796 (1971)] (see **1.11**C):
   - "It is fundamental, of course, absent special circumstances, such as insolvency of the landlord, or the inadequacy of any legal defense which could be interposed thereto, that equity will not interfere ..., since whatever defenses the tenant may have ... may be interposed in the dispossessory proceeding as readily as in a court of equity [270 App. 93, 95, 206 SE2d 112 (2004)].

C. If the magistrate court is without jurisdiction to hear a defense or counterclaim, the case should be transferred to superior court [177 App. 623, 340 SE2d 268 (1986); OCGA 15-10-43(d)].

D. Magistrate Court *apparently* has jurisdiction over counterclaims in dispossessory actions without monetary limitations [243 App. 204, 532 SE2d 756 (2000) (dicta); *but see* 221 App. 276, 470 SE2d 807 (1996), 211 App. 268, 438 SE2d 715 (1993), OCGA 15-10-45].

E. Magistrate Court has jurisdiction to sign and enforce consent agreement requiring repairs by landlord (not equitable) [264 App. 273, 590 SE2d 250 (2003)].

NOTE - If there was an equitable defense raised, you should attempt to direct any appeal to the superior court due to the inconsistent decisions of the Court of Appeals concerning the jurisdiction to hear such matters.

2.33 Defenses (see also **2.24** above for required elements of dispossessory which may be denied).

A. General denial - the tenant generally denies the truth of the facts contained in the landlord's affidavit [97 App. 491(1), 103 SE2d 440 (1958)]; ***may deny landlord-tenant relationship*** through ownership of property [194 App. 693, 392 SE2d 15 (1990); 200 App. 592, 409 SE2d 71 (1991)] (see **2.24**A, G above). (Also see **2.24**C and E for other defenses).

B. Acceptance of rent after its due date (see **2.33**H(4) also):

1. Acceptance of rent after default defeats a claim for non-payment of rent [140 App. 244, 230 SE2d 492 (1976); 156 App. 764, 767, 275 SE2d 394 (1980)]. Even landlord holding a check and not promptly returning it may defeat the eviction [163 App. 832, 296 SE2d 149 (1982); but see 218 App. 443, 462 SE2d 384 (1995)].
   - Probably inapplicable to commercial leases [*see* OCGA 44-7-52(c) (acceptance of less than all rent plus court costs "shall not be a bar or defense to an action under OCGA 44-7-50 ")].
2. Acceptance of rent will defeat a claim for holding over (by accepting rent, a tenant at sufferance is converted into a tenant at will entitled to sixty days notice) [166 App. 359, 304 SE2d 483 (1983)].

NOTE - Accepting rent **after** filing dispossessory for **holding over** does not necessarily stop landlord from obtaining writ [167 App. 786, 307 SE2d 687 (1983)].

C. Failure by the landlord to give the statutory two-month notice to tenant at will (does not apply to tenant at sufferance or claim for non-payment of rent) [199 Ga. 801, 35 SE2d 502 (1945)].

D. Failure of Landlord to Repair:

1. If landlord fails to repair after reasonable notice from the tenant, tenant may repair the defect and deduct the reasonable cost of repair from the rent [233 Ga. 279, 210 SE2d 809 (1974)].
   - Repair involves fixing a defect after notice, not maintenance to avoid the problem [287 App. 529, 652 SE2d 167 (2007)].
2. Notice of a defect is notice of all defects that would be discovered during repair. Landlord may also be deemed to have constructive notice when repair is inadequate [222 App. 26, 473 SE2d 569 (1996); 250 App. 393, 395(1), 551 SE2d 811 (2001)].
3. Tenant may counterclaim or set-off the diminishment in the value of the

premises caused by Landlord's failure to repair [152 App. 782, 789; 264 SE2d 262 (1979)].

4. If the landlord fails to comply with obligation to repair rental property, the tenant may be excused from paying rent **only if the tenant's counterclaim equals or exceeds rent due** (see 2.35) [134 Ga. 149, 157-8, 67 SE2d 662 (1916); 174 App. 585, 330 SE2d 729 (1985)].

E. Constructive eviction
   1. Failure to repair property makes it unfit to live in or defeats the purpose in renting the property;
   2. It could not be restored to a fit condition by ordinary repairs which could be made without unreasonable interruption of the tenant's business; *and*
   3. Requires a grave condition of a ***permanent*** nature [286 App. 227, 648 SE2d 651 (2007); *see* 143 App. 217, 237 SE2d 688 (1977), 140 App. 784, 232 SE2d 134 (1976), 94 App. 750, 96 SE2d 305 (1956) (rotten, severely leaking roof enough)].
   4. Constructive eviction defeats claim for rent but tenant usually required to vacate the premises to assert constructive eviction [140 App. 784, 232 SE2d 134 (1976)].

F. Other counterclaim which equals or exceeds claim for rent [174 App. 585, 330 SE2d 729 (1985)], but a **tort** counterclaim, such as for personal injury, **will not stop eviction** [189 App. 268, 375 SE2d 282 (1988)].

G. Failure to make demand for possession prior to filing dispossessory [OCGA 44-7-50]. May be raised at trial even if not raised in answer [180 App. 648, 350 SE2d 40 (1986)].

H. Defenses for **NON-PAYMENT OF RENT**:

   1. Tender after warrant:
      a. The tenant may tender to the landlord rent owed plus the cost of the warrant within seven (7) days after being served with the affidavit and summons [OCGA 44-7-52]. The landlord may not be required to accept uncertified checks <u>if</u> he/she states that reason for refusal.
      b. The tender of rent is a defense to the action so long as the tenant has only used this right once in a 12-month period [OCGA 44-7-52, 167 App. 725, 307 SE2d 671 (1983)].
      c. If properly tendered the rent and landlord refused, the court shall issue an order requiring payment of the rent and costs within three (3) days and upon failure to pay shall issue a writ of possession [OCGA 44-7-52(b)]. The statute is not clear on whether the rent payable is the rent owed at the time of tender or includes amounts accrued thereafter.

2. Landlord Refuses to Accept Rent: The tenant offered the landlord rent, but the landlord refused to accept rent. Tender is equivalent to payment [83 App. 145, 62 SE2d 415 (1951)].
3. Late Payments: The landlord may have waived the contract provision of timely payments if he/she has accepted several late payments in the past [243 Ga. 500, 255 SE2d 14 (1979); 83 App. 441, 63 SE2d 685 (1951)].

NOTE - Acceptance of one or two late payments alone not enough to establish waiver by past practice without additional evidence of understanding, express or implied [230 Ga. 8, 195 SE2d 417 (1973); 57 App. 418, 195 S.E. 584 (1938)].

4. Partial Payment - **acceptance** of partial payments during a rental period defeats a claim for non-payment of rent for the balance of that rental period (at least absent a contrary **express** agreement) [115 App. 18, 153 SE2d 612 (1967); 140 App. 244, 245-6, 230 SE2d 492 (1976); see 156 App. 764 (3), 275 SE2d 394 (1980) (back rents cannot be collected by threat of eviction after accepting payment in month)] in residential cases [OCGA 44-7-52(c) (probably limits case law to residential leases)].

I. Improper party - proper parties to dispossessory are landlord and tenant; other parties may raise defense of improper joinder [178 Ga. App. 798, 800(4), 344 SE2d 507 (1986); 60 App. 674 (2), 4 SE2d 689 (1939); 110 Ga. 41(1), 35 SE 291 (1900); see 235 App. 705, 509 SE2d 662 (1998)].

J. Citations: CASES

Acceleration of rent as penalty - Simply collecting future rents in a lump sum upon breach of the lease operates as an unenforceable penalty. Provisions for liquidated damages in lieu of future rents not yet due are enforceable only if they discount future sums due to present value by an implicit interest rate ***and*** discount the amount to be collected based upon a reasonable estimation of the rents to be collected by reletting the premises [206 App. 591(3), 426 SE2d 243 (1992)].

Checks - If lease does not authorize check, Landlord may insist upon cash unless there has been a mutual departure from such a mode of payment. If Landlord wishes to insist upon payment in cash, he/she must promptly reject the check stating that the reason for rejection is the mode of payment [217 Ga. 407 (2), 122 SE2d 580 (1961)].

Constructive notice of defects - a landlord has constructive notice of defects in structures constructed by him/her or items which existed at outset of lease which would be noticed in an inspection. The fact that a condition was actually observed does not necessarily mean that the defect would be recognized. Here landlord used attic stairs but did not consider the following a defect: (1) no mechanism attached lower portion to upper portion to prevent separation; (2) angle and design of lower portion increased chance of slippage and separation [287 App. 529, 652 SE2d 167 (2007)].

Counterclaims - If **tenant's counterclaims** (for such items as diminishment in value of premises and punitive damages (see **2.35**C) **exceed** the **rent due**, no writ should issue [174 App. 585, 330 SE2d 729 (1985)].

County board of health may only pass regulations pertaining to disease and similar health problems and may not regulate public safety issues such as swimming pool safety [233 Ga. 948, 213 SE2d 890 (1975);); 292 App. 692, 666 SE2d 63 (2008)].

Demand for possession - Failure to raise in the answer a claim that no demand for possession was made creates a rebuttable presumption in favor of the allegation in the landlord's affidavit that demand was made [180 App. 648, 350 SE2d 40 (1986)].

Estate for years not a landlord-tenant relationship [OCGA 40-6-101] and no dispossessory is available [288 App. 75, 653 SE2d 791 (2007)].

Eviction and reentry normally terminates the lease and the obligation for rent for balance of term of lease [186 App. 466, 367 SE2d 317 (1988)]; however, "the parties to a lease agreement may contract in advance to hold the lessee liable for rent even after an eviction, deducting therefrom only the amounts recovered by the lessor from reletting the premises... if such an agreement is premised on the existence of an explicit and detailed provision in the lease which clearly and unequivocably expressed the parties' intention to hold the lessee responsible for after-accrued rent even

should an eviction take place" [206 App. 591, 426 SE2d 243 (1992)]. Alternately, parties may agree that eviction and reentry shall not terminate the lease, but that the landlord may continue to hold tenant responsible for future payment of rents while reletting the premises, with the rents collected being credited to the evicted tenant's benefit [262 App. 770, 586 SE2d 442 (2003)]. ***Involuntary eviction*** without termination would probably require good faith efforts to rent property at market rates. Where the intent to allow collection of future rent is part of an illegal acceleration ***penalty***, future rents are uncollectible [267 App. 780, 782, 601 SE2d 125 (2004)] (see "Acceleration of rent" above).

Eviction obtained through fraud - where an eviction is obtained through fraud after agreeing to settlement, writ of possession could be set aside after its execution and separate action brought for fraud - action for **fraud in obtaining eviction is not compulsory counterclaim** in the dispossessory [254 App. 745, 563 S.E.2d 447 (2002)].

Landlord's title - see **2.24** above.

Military personnel who receive change of station orders or temporary duty orders of over 3 months - Liable for maximum of 30 days rent after they give written notice and proof of change of duty to landlord on residential rental agreement. Also liable for damage to unit caused by them [OCGA 44-7-37].

No mitigation of damages required - Landlord does not have to attempt to rent out property when tenant **abandons** it without dispossessory [207 App. 328 (1993)].

Obligation to pay rent is independent covenant **from** Landlord's **obligation to repair** premises so that failure to repair does not normally excuse failure to pay rent. [Dawkins, Georgia Landlord and Tenant Breach and Remedies, § 2-6]. Of course, the parties can expressly agree to make the obligations dependent; an agreement to make repairs prior to occupancy may be a condition precedent to payment of rent [28 Ga. 422 (1859); 21 Ga. 430 (1856)]. If there is a written lease, such a condition precedent would have to be in writing to avoid the parol evidence rule [35 App. 262, 133 SE 53 (1925)], and if the Plaintiff did not reject the premises and move out within a short time, an implied obligation to pay rent might arise [OCGA 44-7-5; but see 28 Ga. 422 (1859)].

Payment by mail - Payment of rent by mail is only effective when received unless the contract or course of conduct of the parties make it effective upon mailing and tenant bares the risks of non-receipt and lateness [268 App. 122, 601 SE2d 350 (2004)].

Rent due - Each month's rent is a separate cause of action unless there is a valid "acceleration of rent" clause in the lease. Therefore, the tenant may only sue for the amount due at the time the warrant is filed [290 App. 613, 660 SE2d 26 (2008)]. Where the case is not in default, the Court may allow rent due through the date of the trial to be added by amendment (see

2.53A), but the landlord is not required to do so and cannot be barred from raising those amounts in a later suit if those amounts are not acually litigated at trial [290 App. 613, 660 SE2d 26 (2008)].

Rodent infestation can be considered failure to repair [174 App. 585, 330 SE2d 729 (1985)].

Termination of lease by tenant ineffective if tenant does not vacate premises at time specified in notice [254 Ga. App. 293 (2002)].

Waiver - Strict compliance with the terms of the lease may be waived by the conduct of the parties even when the contract specifies that there shall be no waiver of any provision unless made in writing [83 App. 441, 63 SE2d 685 (1951); 201 Ga. 649, 40 SE2d 531 (1946)]. In particular, a contract requirement that **repair requests** be written is waived if there has been any response to previous oral requests [207 App. 624, 428 SE2d 654 (1993); 139 App. 480, 481(1), 228 SE2d 615 (1976)]. If there has been a departure from the terms of the contract, a party may insist upon a return to the exact terms of the contract only after giving reasonable notice to the other party of such intention [OCGA 13-4-4].

2.34 Federal Housing Programs - Defenses to dispossessories:

A. General - Landlords under Federal Housing Programs must comply both with Georgia Landlord-Tenant law and with applicable Federal statutes and regulations [129 App. 188, 199 SE2d 107 (1973)]. Additionally, the leases frequently contain provisions which give tenants much greater procedural rights than found in Georgia law.

B. Public Housing - housing for low-income people, rented by local housing authority and subsidized by HUD [Governed by 42 U.S.C. 1437 et seq. and 24 CFR 900-999, particularly 24 CFR 966.4 lease requirements].

1. Written notice of lease termination required setting forth:
   a. Specific reason for termination;
   b. Right of tenant to reply;
   c. Right to grievance hearing which suspends right of authority to file dispossessory until hearing held [24 CFR 966.4; 167 App. 181, 306 SE2d 9 (1983)].
2. Georgia statutory demand for possession may now be made at the same time as the federally required lease termination notice; the demand for possession must be made in a separate writing [OCGA 44-7-50(b)].
3. Good Cause Required for Lease Termination - Authority cannot terminate or **fail to renew** lease except for serious or repeated violation of material terms of lease - warning and opportunity to cure conduct required except for serious violations such as those which threaten the health or safety of other project inhabitants or falsifying income information. Good cause includes
4. Rent issues - in public housing adverse economic circumstances may be a defense; **if** Authority has been informed of change in income, it may be obliged to make an interim rent adjustment [24 CFR 913].

C. Section 8 Housing - HUD pays part of market rent to private landlords on behalf of low-income tenants [governed by 42 U.S.C. 1437(f) and 24 CFR 812-13, 880-889].

1. General - the landlord is specifically prohibited from requiring "side payments" from tenant (such as parking, garbage collection, taxes, etc.) and security deposit may be limited.
2. Section 8 - Public Housing Authority contracts - where Authority contracts with private landlords to provide housing, procedure is largely the same as where Authority is the landlord except there is no grievance procedure.
3. Section 8 "set-aside" housing - written contract directly between landowner and HUD for providing low-income housing with HUD supplementing tenant's rent by direct payment to landowner.
   a. Notice of Termination - Landlord must give written notice of termination stating grounds, date of termination, and giving tenant 10 days to respond [24 CFR 886.128].
   b. Good cause - termination requires material noncompliance with terms of lease or other good cause defined in lease or regulations.
   c. Tenant entitled to interim rent adjustments if proper notice is given to landlord of change in family income or size.

2.35 Counterclaims - Counterclaim may be made for any claim Defendant has against Plaintiff [OCGA 15-10-43 & 44-7-51]; if claim is beyond the jurisdiction of the magistrate court, then court should transfer to appropriate court (however, counterclaims in dispossessory exceeding general magistrate civil monetary jurisdiction may be permissible) (see **2.32**).

A. Diminution in value of rental property due to landlord's failure to make necessary repairs is a compulsory counterclaim [182 App. 165, 355 SE2d 99 (1987)].

1. Obligation to repair and comply with housing ordinances cannot be waived in ***residential lease*** [OCGA 44-7-2].
2. These rights are subject to modification by agreement ***in non-residential leases*** [234 App. 849, 507 SE2d 817 (1998) (where commercial tenant responsible for repairs and lease requires written consent to improvements, oral notice of fact of improvements not a waiver of provision); 250 App. 393, 395(2), 551 SE2d 811 (2001) (commercial tenant's acceptance of property as in good condition precludes claim for non-compliance with ordinances; commercial landlord does not assume new repair duties when tenant sub-lets property as residential without consent of landlord)].
3. Obligation to repair arises after notice to landlord of defect
   a. No duty to inspect premises [169 App. 635, 314 SE2d 471 (1984)];
   b. Notice of a defect is notice of all defects that would be discovered during repair. Landlord may also be deemed to have constructive notice when repair is inadequate [222 App. 26, 473 SE2d 569 (1996); 250 App. 393, 395(1), 551 SE2d 811 (2001)].
   c. Oral notice is usually sufficient, requirement of written notice waived by failure to object [139 App. 480, 228 SE2d 615 (1976)].
4. **Patent Defects** - Landlord not liable to repair patent (obvious) defects in the premises present at the beginning of the lease **unless** agreed to in rental contract **or unless** the condition makes the premises **uninhabitable** or is in **violation of law** (e.g., housing code) [84 App. 617, 66 SE2d 806 (1951); 259 Ga. 126, 377 SE2d 660 (1989); but see 250 App. 393, 395(2), 551 SE2d 811 (2001) (commercial)]. If there is an oral lease, whether the landlord agreed to repair less serious defects would be a question of fact, but if lease is written, the parole evidence would require the agreement to repair be in writing. Landlord cannot avoid obligations under housing codes [OCGA 44-7-2(b)(3)].

B. Punitive damages for failure to repair:

1. May result from failure to repair as required by housing code or other law or regulation [237 Ga. 132, 227 SE2d 38 (1976) (residential property)];
2. Repeated failure to properly repair [183 App. 581, 359 SE2d 446 (1987); 190 App. 709, 379 SE2d 528 (1989)];
3. Wanton disregard for tenants' rights if result amounts to a trespass against the tenant [117 App. 109, 159 SE2d 304 (1968); 176 App. 873, 339 SE2d 266 (1985)].

C. Damages to personal property or persons due to Landlord's failure to repair a defect in the premises [OCGA 44-7-13, -14]. A tort counterclaim is not a setoff against the rent claim and would not delay or stop the issuance of a writ of possession for failure to pay rent [189 App. 268, 375 SE2d 282 (1988)].

D. Claim for return of Security Deposit **not permitted** (claim is not ripe until 30 days after tenant leaves).

E. Landlord is liable for any substantial improvements to property by tenant made with Landlord's consent [OCGA 44-7-13; 205 App. 371, 422 SE2d 253 (1992)].

F. Trade fixtures [OCGA 44-7-12] Tenant entitled to remove trade fixtures (articles attached to property to facilitate trade or business), but if tenant continues to occupy after term such fixtures may be treated as abandoned [205 App. 206(1), 422 SE2d 204 (1992); *see* 278 App. 149, 628 SE2d 117 (2006) (airport hanger bolted to ground was trade fixture and court was correct to order tenant to remove at own expense)].

G. Emblements - when crops are planted before notice of termination of tenancy or before judicial sale of landlord’s interest, or other sudden termination of tenancy [OCGA 44-7-8].

2.4 DEFAULT JUDGMENTS

A. If, after 7 days, the tenant has not answered, a default judgment shall be entered without further evidence or a hearing on behalf of the landlord for all rents ***due*** as alleged in the affidavit [OCGA 44-7-53].

B. **No money judgment** may be entered if the tenant did not answer and there was only "tack and mail" service [OCGA 44-7-51(c); 226 Ga. 860(1), 178 SE2d 183 (1970)]; if answer filed and default was from failure to appear, money judgment OK.

C. If the affidavit fails to demand or state the amount of rent due, the default judgment should be for a writ of possession but not for a money judgment [153 App. 825, 266 SE2d 574 (1980)]. Writ of possession and money judgment, where applicable, shall be immediate upon default [OCGA 44-7-53].

D. Amount of judgment should be only for rent due and owing at time of filing, not for rent accrued since that time [see 156 App. 396, 274 SE2d 582 (1980)].

2.5 PROCEDURE AFTER ANSWER

2.51 When Payment of Rent and Utilities Into Court is Required.

A. Tenant **not** required to pay rent into court as a prerequisite to filing an answer or a counterclaim [146 App. 786(3), 247 SE2d 597 (1978); 233 Ga. 414, 211 SE2d 712 (1975)].

B. Payment into court **is** required:

1. Tenant required to pay rent into court when the right of possession cannot be finally determined within two weeks from the service of landlord's affidavit upon defendant [OCGA 44-7-54];
2. Tenant is also required to pay utility payments into court which are the responsibility of the tenant to the landlord **under the terms of the lease**;
3. Although OCGA 44-7-54 does not expressly state that a court order is necessary to compel payment of rent into court, requiring such an order is the accepted practice [See 135 App. 50, 51, 217 SE2d 381 (1975); 171 App. 618, 310 SE2d 622 (1984); 201 Ga. App. 291, 410 SE2d 759 (1991) (must determine amount and order payment)];

4. OCGA 44-7-54 must be strictly complied with - Court is without discretion to excuse a late or incomplete payment [266 App. 34, 37, 596 SE2d 209 (2004) (leaves open possibility of submitting ambiguous provision for court construction at hearing after full tender under movant's construction)].
5. A landlord who wants the tenant to pay rent into the court's registry should file a motion based on OCGA 44-7-54 seeking a court order compelling such payment [135 App. 50, 51, 217 SE2d 381 (1975)].

C. Determination of amount of rent and utilities to be paid into court - in the event there is a controversy between the landlord and tenant as to the amount of rent due, the court shall look to:

1. The amount of rent provided for in the contract.
2. If there is no contract, then the last rent tendered by the tenant which was received without written objection by the landlord [OCGA 44-7-54].
3. Where allegation involves tenancy at sufferance, such as after foreclosure, a market rate of rent is set by the court [236 App. 747, 512 SE2d 671 (1999); 170 App. 867, 318 SE2d 674 (1984)].

D. Failure to pay rent into court results in **final judgment** as to question of right to possession but does not dispose of parties' monetary claims [180 App. 431, 349 SE2d 284 (1986)].

E. Citations: CASES

Payment of rent into court is not a condition precedent to filing an answer and counterclaim [134 App. 813, 216 SE2d 369 (1975)].

Writ of possession for failure to pay rent into court becomes final judgment if there are no unresolved claims aside from distribution of the funds already paid into court [236 App. 747, 512 SE2d 671 (1999); 180 App. 431, 349 SE2d 284 (1986)]. Writ may be issued prior to resolution of issue whether defendant is a tenant at sufferance, and all such issues are decided by the court without the right to jury determination [236 App. 747, 512 SE2d 671 (1999)].

2.52 Trial

A. After the answer is received by the court, the court should try to expedite the trial.

B. At Trial:

1. The landlord is required to establish a prima facie case in order to maintain an action [163 App. 460, 294 SE2d 691 (1982)];
2. If the landlord has established a prima facie case, the tenant may present evidence to refute the allegations of the landlord [146 App. 750, 247 SE2d 601 (1978)] and may present any counterclaim.

2.53 Judgment

A. If judgment is against the tenant after ***trial*** (not by default) (But see **2.4** where judgment by default):
   1. for all rent due and any other claims relating to the dispute [OCGA 44-7-55(a)].
   2. a writ of possession [OCGA 44-7-49, 44-7-55(c)]:
      - authorizes removal of tenant and property from the "premises" - place property "on some portion of the landlord's property or on some other property as may be designated by the landlord and as may be approved by the executing officer;"
      - landlord does not have responsibilities to property after eviction - the property "shall be regarded as abandoned;"
      - court may not place restrictions, responsibilities, or conditions upon the landlord in order to be placed in full possession of land or other property.

   Both writ of possession and judgment are effective at the expiration of seven (7) days after entered. Where the defendant answers but fails to appear for trial, the judgment would be an immediate default judgment [OCGA 44-7-53].

NOTE - Unlike the Civil Practice Act, URMC § 37 governing amendments in the magistrate court does not distinguish amendments raising events subsequent to the filing of the statement of claim. Normally, amendments raising rentals accruing after the filing of the claim should be allowed in the magistrate court unless the opposing party is surprised and genuinely unprepared to address those later accrued rentals. If both parties are present at the hearing, the later accruing rentals may be awarded if proved without objection or the court may allow an oral motion to amend the landlord's claim [194 App. 141, 390 SE2d 242 (1990)]. If the tenant does not appear, the default judgment should not exceed the amount properly claimed in the pleadings.

B. If judgment is for the tenant - tenant shall remain in possession and the landlord is liable for all foreseeable damages caused by his/her wrongful conduct [OCGA 44-7-55(b)].

C. Funds remaining in the registry of the court should be distributed in accordance with the judgment of the court [OCGA 44-7-55(b)].

D. *Res judicata* effects

1. Where personal service or defendant answer, final judgment will **bar** accrued rent claims as *res judicata* [237 App. 415, 514 SE2d 216 (1999)].
2. Where service is by "tack and mail" and defendant does not answer, no jurisdiction to enter money judgment results in no *res judicata* as to rent and other money claims [275 App. 143; 619 SE2d 814 (2005); *see* OCGA 44-7-51(c)].
3. No case law on damage to premises - given statutory procedure for handling damage claims after tenant vacates premises (see **2.73-2.75**), such claims in a dispossessory ***should*** be treated as either not ripe or not compulsory and thus not subject to *res judicata*, allowing later litigation.

E. For Post-judgment Discovery, see **1.7**.

2.54 Appeal

A. Appeal may be made to the state or superior court (see **2.32** (note) for when appeal should be sent to superior court) within seven (7) days [OCGA 44-7-56].

B. Tenant *shall* be required to pay future rents into court (see **2.51**). Hearing should be scheduled as soon as possible if necessary information was not proved at trial. Additionally, tenant *shall also* be required to pay into the registry all sums found by the trial court to be due for *rent* [OCGA 44-7-56]. The tenant remains in possession unless there is a failure to comply with the order to pay rent into court.

C. Distribution of funds in court - Sums found by the trial court as due the tenant are retained in the registry, all other sums are paid to the landlord as are future rent payments unless the tenant shows good cause that some or all of the payments should remain in the court [OCGA 44-7-54].

D. <OPTIONAL: Judge may amend order within 15 days to supplement the record with findings of fact and conclusions of law>.

2.6 DISTRESS PROCEEDINGS

2.60 CHECKLIST

1. Is property or defendant located in your county? If not, transfer case to proper county.

2. Is action prosecuted by legal entity?

3. Is any appropriate party attempting to intervene?

4. Was an answer timely filed on or before hearing date (within five to seven days of service?)

If not, issue writ against personal probperty (see **2.64**A). Issue money judgment for rent claimed *only if* warrant was served either to defendant **personally** or to other **sui juris** resident of defendant's household (see **2.63**B)

5. If answer has been filed and no party is appearing to contest proceeding, issue default judgment for writ and amount originally properly claimed in warrant (see **2.64**D).

6. If case continued beyond seven days from date of answer require payment of rent into court (see **2.65**).

7. Examine answer. If no legal defense or counterclaim (see below) has been raised, then verify absence of legal defense and prepare judgment (see **2.67**C). If counterclaim beyond jurisdiction of court (see **1.11**), then transfer case.

8. Trial - Landlord must show:
   a. Existence of landlord-tenant relationship;
   b. Grounds for distress:
      i. non-payment of rent;
      ii. tenant attempting to remove goods (considered questionable by authorities despite appellate approval - see **2.67**B);
   c. Property levied on belongs to tenant (see **2.67**B).

9. Consider defenses and counterclaims.

10. Enter judgment (see **2.67**C).

11. If appealed, enter order for payment of rent into court and forward record to appropriate court (see **2.68**).

2.61 Use of Distress Proceeding [44-7-71 et seq.]

A. Definition

Distraint is a right vested in the landlord which allows the landlord to cause his/her tenant's property to be seized to satisfy the rental obligation of the tenant.

B. Landlord/tenant relationship - a landlord/tenant relationship must exist before a distress warrant may be issued [83 App. 150(3), 62 SE2d 919 (1951); 218 App. 160; 460 SE2d 835 (1995)]. (For different types of landlord/tenant relationships (see **2.1**)).

A tenant may distrain subtenant [119 Ga. 241, 46 SE 104 (1903)].

2.62 Affidavit

A. Who may make an affidavit?

The only people who may make an affidavit in a distress proceeding are the landlord, his/her agent, attorney in fact or attorney at law [OCGA 44-7-71].

B. Who the affidavit must be made before:

1. The affidavit must be made under oath before the judge of superior, state or magistrate court in the county where the tenant resides or the property may be found [OCGA 44-7-71].
2. The affidavit may also be made before the clerk of the court, where the clerk has been granted authority to perform all purely ministerial duties [151 App. 345, 259 SE2d 731 (1979)].
3. An affidavit may **not** be made before a notary public [152 App. 212, 262 SE2d 533 (1979)].

C. Contents of Affidavit:

1. The affidavit must set forth the facts by which the landlord brings the distress proceeding [OCGA 44-7-71].
2. The affidavit must contain averments of **either** non-payment of rent **or** removal of goods from the leased premises [OCGA 44-7-71].
3. The affidavit should also allege that the tenant either resides within the county where the application is made, or that the tenant has property in that county [20 App. 350, 93 S.E. 32 (1917); 88 Ga. 207, 14 S.E. 193 (1887)].
4. Landlord may include other claims related to the lease, such as for damage to the property, if Landlord also has a valid claim for past-due rent [218 App. 446, 462 SE2d 378 (1995)].

NOTE - The affidavit need not contain a demand for the payment of rent as a distress proceeding may be brought without any demand for payment of rent [85 App. 124, 68 SE2d 242 (1952)]. (But see NOTE at **2.67**B).

2.63 Summons and Service of Process:

A. Summons:

1. After the affidavit has been made, the judge shall grant and issue a summons to the marshal or sheriff of the county in which the Defendant resides or where the property may be found [OCGA 44-7-72].
2. The summons served on the Defendant shall command the Defendant to appear at a hearing on a particular day no less than five nor more than seven days from the date of actual service [OCGA 44-7-72].

B. Service of Summons and Affidavit:

1. The summons and affidavit should be personally served upon the tenant [OCGA 44-7-72].
2. If the tenant is unable to be personally served, service may be perfected by delivering the summons and affidavit to any person who is sui juris residing on the premises [OCGA 44-7-72].

NOTE: The distress statute does not allow the "tack and mail" service as does the dispossessory statutes.

2.64 Answer (Failure to Answer), Defenses and Counterclaim

A. Time for Answer:

The tenant may answer in writing at or before the time of the hearing (five to seven days from the date of actual service) [OCGA 44-7-74]. If the hearing is postponed, the time for answer is extended to new hearing date [205 App. 331, 422 SE2d 55 (1992)].

B. Form of Answer - Contents:

1. The answer may be in writing or oral [OCGA 44-7-74(a)].
2. If the answer is oral, it must be given under oath and the substance must be written by the court upon the affidavit [OCGA 44-7-74(a)].
3. The answer may contain any legal or equitable defense or counterclaim [OCGA 44-7-74(a)].

C. Effect of Answer:

1. If the tenant answers, a trial on the issues shall be scheduled. The trial should be held as soon as practicable [OCGA 44-7-74(c)].
2. The tenant should be allowed to remain on the premises and in possession of his/her property pending the final outcome of the litigation (provided that the tenant pays rent into court) [OCGA 44-7-74(c)].

D. Failure to Answer - if the tenant fails to answer at or before the time of the hearing, the Plaintiff is entitled to a distress warrant and a verdict and judgment for all rent due [OCGA 44-7-74(b)].

E. Opening Defaults - most courts grant distress warrants without allowing time for opening the default [compare 172 App. 674, 324 SE2d 532 (1984) declaring that dispossessory defaults cannot be reopened].

F. Defenses: It would appear that most defenses available in dispossessories would also be available in distress proceedings [see 116 App. 803, 159 SE2d 803 (1967) (recoupment and set-off of claims arising out of contract are defense to distress)] (see **2.33** for dispossessory defenses).

1. Tender of rent by tenant - tender of a rental payment by the tenant acts as a complete defense in an action for non-payment of rent, **if** the tenant tenders to the landlord the amount of the **rent plus all costs** within **seven days** after the tenant was served with the summons and affidavit [OCGA 44-7-73].
2. Defective Summons and Affidavit - the defense that the summons and affidavit are defective must be raised in the defensive pleading or it is waived [151 App. 345, 259 SE2d 731 (1979)].
3. Tender may constitute a defense to the action if timely or if the landlord has waived right to demand timely payment [41 App. 110, 151 SE 926 (1929)].

G. Counterclaims - tenant's right to counterclaim is virtually unlimited [OCGA 44-7-74], but affirmative equitable relief may only be granted in superior court (see **2.32** and **1.11** for jurisdictional issues) [116 App. 803, 159 SE2d 92 (1967)].

2.65 Payment of Rent into Court: **IF** tenant wishes to maintain possession of the property during the litigation, he/she must pay rent into court or post bond.

A. Time payment of rent into court must be made:

1. The statute requires the tenant to pay into the registry of the trial court all rent admitted due [OCGA 44-7-75(a)] - but case law requires a court order and violation of its terms before a writ of possession is issued (compare **2.51**).
2. The tenant must also pay all rents as they accrue after answer filed [OCGA 44-7-75(b)].

B. Determining the amount of rent:

1. If there is a disagreement as to the amount of rent due, the landlord or tenant may submit to the court any written rental contract to establish the amount of rent to be paid [OCGA 44-7-75(b)].
2. If no rental agreement exists, the court shall require the amount of rent to be an amount equal to the last previous rental payment made by the tenant and accepted by the landlord without written objection [OCGA 44-7-75(b)].
3. The tenant may be excused from payment of rent into court upon submitting a receipt indicating that the payment has been made to the landlord [OCGA 44-7-75(a)].
4. If the landlord is also seeking a dispossessory warrant against the tenant (**2.2**), money paid into court under that proceeding satisfies the requirements of this section [OCGA 44-7-75(c)].

C. Payment to landlord of rent paid into court:

1. The court should order the clerk of court to pay the landlord the amount paid into the registry of the court as the tenant makes those payments [OCGA 44-7-75(f)].
2. If the tenant claims to be entitled to all or part of the funds as a result of a counterclaim, the court should withhold this amount from payment to the landlord. That portion of funds shall remain in the registry of the court until a final determination of the issues [OCGA 44-7-75(f)].

3. If the tenant fails to comply with the requirements of this section, the tenant is not entitled to retain possession of the property unless he/she posts a bond in compliance with **2.66** [OCGA 44-7-75(e)].

NOTE - Failure to pay rent into court or post bond "shall in no way affect the tenant's ability to litigate the issues raised in his/her answer but shall only affect the possession of the property (during the lawsuit)" [OCGA 44-7-75(e)].

2.66 Bond:

A. When bond must be made:

In any case in which the tenant desires to transfer, remove or convey any of his/her property after the service of summons, the tenant must post bond [OCGA 44-7-76].

B. Amount of Bond:

The tenant must post bond, with good security, for an amount equal to the value of the property or the amount of the rent alleged to be due, whichever is less, to be estimated by the judge for the delivery of property at the time and place of sale if the property shall be found subject to rent [OCGA 44-7-76].

2.67 Trial and Judgment:

A. Trial: After the answer is received by the court, the court should make every effort to expedite the trial.

B. At Trial

1. Landlord's burden of proof:
   a. At the trial the landlord is required to establish either non-payment of rent **or** threat of removal of goods from the leased premises [Dawkins, Georgia Landlord and Tenant Breach and Remedies, §6-3, p. 98 (1985)].

QUERY - How does a landlord prove that tenant was planning to move property and what is remedy if tenant was planning to move property but was not behind on rent? Further, the statute gives tenant a right to tender rent as an absolute defense. How is this applied where no past due rent is claimed? For these and other reasons, authorities such as Dawkins are dubious about distress for removal of goods despite appellate case upholding it [152 App. 212(3), 262 SE2d 538 (1979)].

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   b. The landlord must show that the property levied on is the property of the tenant [108 Ga. 778, 33 S.E. 658 (1899)].
2. If the landlord fails to establish a prima facie case, the tenant should move for dismissal at the end of the landlord's case.
3. Introduction of evidence by the tenant:
   a. If the landlord has proven a prima facie case, the tenant is then entitled to introduce evidence to refute allegations of the landlord [56 App. 692, 193 S.E. 610 (1937)].
   b. The tenant must also introduce evidence to prove any defenses or counterclaims which have been properly pled.

C. Judgment:

1. If the judgment is against the tenant, judgment should be entered against the tenant for all rent due and for any other claim relating to the dispute, and the distress warrant should be granted [OCGA 44-7-77(a)].
   Landlord cannot convert distress warrant into general complaint for damages [175 App. 482, 333 SE2d 685 (1985)], but may recover for damages related to the lease (such as damages to the subject property) if a valid claim for rent is shown [218 App. 446, 462 SE2d 378 (1995)].
2. If the judgment is for the tenant,
   a. He/she shall be entitled to remain in the premises and in possession of his/her property [OCGA 44-7-77(b)].
   b. The landlord is liable for all foreseeable damages shown to have been caused by his/her wrongful conduct [OCGA 44-7- 77(b)].
   c. If the tenant has been deprived of possession of his/her property, the court shall order that the property be returned immediately to the tenant [OCGA 44-7-77(b)].
3. Any funds remaining in the registry of the court shall be distributed in accordance with the judgment of the court [OCGA 44-7-77(b)].

D. For Post-judgment Discovery, see **1.7**.

2.68 Appeal

A. Judgments are appealable to the state or superior courts [OCGA 15-10-41].

B. If the judgment is against the tenant, he/she is entitled to remain in possession of both the leased premises as well as his/her goods and property until a final determination of the issue on appeal, as long as the provisions described in **2.65** and **2.66** are followed.

2.69 Execution of Judgment:

A. Levy of Distress Warrant - whenever a distress warrant is granted, the warrant may be levied by the marshal, the sheriff or deputy on any property belonging to the tenant, whether found on the premises or elsewhere [OCGA 44-7-79)].

B. Advertisement - the marshal, sheriff or deputy shall advertise and sell the property in the same manner as in the case of levy and sale under execution [OCGA 44-7-79].

2.7 SECURITY DEPOSITS

2.70 CHECKLIST

1. If Landlord is a natural person (not a corporation or limited partnership) whose family owns less than 11 rental units and does not hire a paid property manager, only consider step 5.

2. Deposit in escrow required unless bond posted (see **2.72**).

3. Before occupancy, Landlord must give list of damages and allow Tenant to inspect (see **2.73**).

4. After property vacated, Landlord must inspect within 3 business days, make list of damages, and allow Tenant inspection (see **2.74**).

5. Landlord must return deposit within one month if money owed. If Landlord retains money for damages, must deliver list of damages to Tenant (see **2.75**).

6. Triple damages plus attorneys fees normally recoverable if money wrongfully withheld (see **2.76**).

7. Landlord can retain deposit money for unpaid rent without notice (see **2.75**B(6)).

2.71 Definition and Purpose of Security Deposit:

A. Definition of Security Deposit:

1. "Security deposit" includes money or other form of security given by a tenant to a landlord which is to be held by the landlord on behalf of the tenant as agreed to in a residential rental agreement, including damage, pet, and advance rent deposits [OCGA 44-7-30(3)].

NOTE - This provision ***includes*** "advance rent deposits" but ***excludes*** "money . . . which [is] to be applied toward the payment of rent or reimbursement of service or utilities provided to the tenant". This probably should merely be interpreted consistent with case law that landlord may hold deposit in such cases without complying with notice provisions [156 App. 401, 274 SE2d 620 (1980)].
Also note that a ***pet deposit*** is only non-refundable if the lease states it is.

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2. "Security deposit" does ***not*** include any fee which is agreed ***not*** to be ***refunded*** to the tenant **under the terms of the rental agreement** [OCGA 44-7-30 (1, 3)].

B. Landlord Exemptions to Security Deposit Law:

1. A landlord, who is a **natural person** (not a corporation or limited partnership) and owns, together with spouse and minor children, **ten or fewer** rental units and does **not hire professional manager**, is not subject to the following provisions of the security deposit law in Georgia [OCGA 44-7-36]:
   a. Escrow Account and Surety Bonds (**2.72**).
   b. List of Existing Damage and Inspection (**2.73**).
   c. Final Inspection (**2.74**) (in part).
   d. Tenant Remedies for Landlord's Failure to Return Security Deposit (**2.76**).

NOTE - **All** residential landlords, retaining all or part of a security deposit *due to a claim of damages to the premises*, **must** send to the tenant's last known address a written statement listing the damages claimed [OCGA 44-7-34].

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2. The security deposit law does not apply to commercial leases [OCGA 44-7-30(1)].

2.72 Escrow Account and Surety Bonds:

A. Escrow Account:

1. Security deposits held by the landlord shall be deposited in an escrow account established solely for that purpose [OCGA 44-7-31].
2. The landlord must notify the tenant, in writing, of the location of the escrow account [OCGA 44-7-31].

B. Surety Bond:

1. As an alternative to establishing an escrow account, the landlord may post and maintain an effective surety bond with the clerk of the superior court in the county in which the rental unit is located [OCGA 44-7-32(a)].
2. The amount of the bond shall be the total amount of the security deposits which the landlord holds on behalf of the tenants or $50,000, whichever is less [OCGA 44-7-32(a)].

2.73 List of Existing Damage and Inspection:

A. List of Existing Damage:

Before receiving any security deposit for the tenant, the landlord must deliver a list to the tenant of existing damage to the premises. The tenant has a right to retain this list [OCGA 44-7-33].

B. Inspection:

1. The tenant has a right to inspect the premises to determine the accuracy of the list before taking occupancy [OCGA 44-7-33].
2. Upon the signing of the lease by both parties, it is conclusive evidence of the accuracy of the list but is not conclusive as to latent defects [OCGA 44-7-33].
3. If the tenant has any objection to the list, the objections must be in writing and signed by the tenant [OCGA 44-7-33].

2.74 Final Inspection:

A. Landlord's Inspection of Premises:

1. Within three business days after the termination of occupancy by the tenant, the landlord or his/her agent shall inspect the premises and prepare a list of any existing damages [OCGA 44-7-33(b)].
2. The list shall contain the estimated dollar value of such damage, which is applied against the security deposit [OCGA 44-734(b)].
3. If the tenant vacates the premises without notice to the landlord, the landlord may make the final inspection within a reasonable time [OCGA 44-7-33(b)].

B. Tenant's Inspection of Premises:

1. The tenant has the right to inspect the premises within business five days after termination of occupancy to determine the accuracy of the landlord's list [OCGA 44-7-33(b)].
2. Once the landlord and tenant sign the list, it is conclusive evidence of the accuracy of the list [OCGA 44-7-33(b)].
3. Any objections to the list by the tenant should be in writing.

2.75 Landlord's Obligation to Return the Security Deposit:

A. Return of the Security Deposit:

The landlord should return the security deposit in full within one month after termination of tenant's occupancy [OCGA 44-7-34(a)].

B. Landlord's Retention of Part, or All, of Security Deposit:

1. The landlord may not retain any portion of the deposit to cover ordinary wear and tear so long as the premises were used for the purposes intended [OCGA 44-7-34(a)].
2. If the landlord desires to retain all or part of the security deposit, he/she must deliver to the tenant a list specifying the exact reasons for withholding [OCGA 44-734(a)].
3. This list should be accompanied by the remainder of the security deposit [OCGA 44-7-34(a)].

4. The list and remainder of the security deposit may be delivered by mail to the tenant's last known address. No personal service is necessary [OCGA 44-7-34(a)].
5. A landlord may not retain any portion of the security deposit if he/she has failed to comply with the requirements in **2.72**, **2.73** or **2.74** [OCGA 44-7-35(a)].
6. Landlord may hold deposit for rent without notice [156 App. 401, 274 SE2d 620 (1980)].

2.76 Tenant Remedies for Landlord's Failure to Return Security Deposit:

A. Tenant may bring action against landlord to recover the amount of the security deposit which the landlord has wrongfully withheld [OCGA 44-7-33(c)]. **Tenant's claims are limited** to those **items** which the tenant specifically **dissented to in the final inspection** of the landlord [OCGA 44-7-33(c)].

B. Damages:

1. A landlord who fails to return **any part** of a security deposit which is required to be returned to the tenant shall be liable for an amount equal to three times the sum improperly withheld plus reasonable attorney fees [OCGA 44-7-35(c)]. These attorney's fees are independent of any contract language.
2. However, if the landlord withholding was a result of a bona fide error which occurred in spite of procedures designed to avoid such errors, as demonstrated by a preponderance of the evidence, the landlord is liable only for the amount withheld [OCGA 44-7-35(c)].
3. If the court determines that neither the landlord nor the tenant is entitled to the entire security deposit, the court shall order an equitable distribution [OCGA 44-7-34(b)].

NOTE: If the landlord is a natural person who owns, together with spouse and minor children, ten or fewer units, and does not hire professional manager, failure to send written notice of damages to tenant would forfeit landlord's claims for damages to the premises but would not demand treble damages [OCGA §44-7-34].

C. Citations: STATUTES

Military personnel who receive change of station orders or temporary duty orders of over 3 months - Liable for maximum of 30 days rent after they give written notice and proof of change of duty to landlord on residential rental agreement. Also liable for damage to unit caused by them [OCGA 44-7-37].

Rental contract must name someone to receive notices and lawsuits; if not, the tenant may serve the person signing the rental agreement [OCGA 44-7-3].

D. Citations: CASES

Failure by landlord to give written notice under OCGA 44-7-33 and -34 precludes claim for damage to premises, but **does not** preclude claim for unpaid rent [156 App. 401, 274 SE2d 620 (1980)].

Negotiation of check for balance of security deposit sent with an itemized list of damages operates as an accord and satisfaction and bars a claim for violation of OCGA 44-7-30 et seq.[162 App. 517, 292 S.E.2d 100 (1982)].

Partial failure to return deposit warrants treble damages and attorney's fees [195 App. 889, 395 SE2d 79 (1990)].