No. _____

In The

Supreme Court of the United States

SMOKEMASTERS RIBS'N POLLO INC.,

Petitioner,

vs.

LILBURN CENTER, LLC.

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

Percy L. Square
Counsel of Record
2379 Apalachee Crucis Lane
Dacula, Georgia 30019
(678) 227-8511
plsquare@yahoo.com

QUESTIONS PRESENTED

Whether a timely filed amended complaint becomes the only operative complaint in the proceeding, and the superseded complaint is a nullity.

Whether a party has a right to be heard on his timely amended complaint.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant Smokemasters Ribs'n Pollo, Inc. discloses the following. There is no parent of publicly held company owning 10% or more of Applicant's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – CONTINUED

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The Georgia Supreme Court's denial of Smokemasters' petition for certiorari appears at App. 1. The affirmation by the Georgia Court of Appeals of the most recent judgment of the trial court appears at App. 2. The most recent judgment of the trial court appears at App. 4. The judgment of the Gwinnett County Superior Court on Petitioner's Second Amended Complaint appears at App. 15.

JURISDICTION

Smokemasters' petition for certiorari to the Georgia Supreme Court was denied on January 8, 2024. Smokemasters invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Georgia Supreme Court's judgment.

I. Constitutional Provisions Involved

> United States Constitutional Amendment XIV, Section 1
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

> or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Georgia Constitution Article I, Section I, Paragraph I, II.

Paragraph I. Life, liberty, and property. No person shall be deprived of life, liberty, or property except by due process of law.

Paragraph II. Protection to person and property; equal protection.

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied equal protection of the laws.

> United States Constitutional Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or of property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

I. STATEMENT OF THE CASE

This case arose in contract where the Petitioner, Smokemasters Ribs & Pollo Inc., a lessee, suffered damages exceeding $100,000 attributable to the actions and inactions of the Respondent Landlord, Lilburn Center, LLC. Multiple hearings ensued, including amendments to the Petitioner's Complaint, and Motions by both parties.

The heart of the present controversy is whether a superseded complaint is a nullity, and thereby making the most recent complaint the only operative complaint in the proceeding. In this case, a hearing on the Defendant's Motion for Summary Judgment was scheduled for May 11, 2018. The Petitioner's Second Amended Complaint was pending on May 10, 2018. However, the Petitioner timely filed a Third Amended Complaint on May 10, 2018 at 4:10 P.M. The Third Amended Complaint did not incorporate the Second Amended Complaint. At a hearing held on the following day (May 11, 2018), the Petitioner argued its Third Amended Complaint.

Several months later, the trial court ruled on the Respondent's motion for summary judgment dismiss. However, in its ruling, the trial court substituted the prior Second Amended Complaint in place of the Third Amended Complaint. Notice was not given beforehand. This reversion back to the prior complaint was *sua sponte* and was shocking as well as a surprise.

Nevertheless, the trial court granted summary judgment against the Petitioner on all counts in the second amended complaint except one count. The Petitioner appealed. The Third Amended Complaint remained dormant in the trial court pending the outcome of the appeal.

In the course of time, both the Georgia Court of Appeals and the Supreme Court of Georgia affirmed the trial court's judgment on the superseded Second Amended Complaint. However, the affirmations were without opinion. Petitioner applied for certiorari to the Supreme Court of the United States, but the petition was deemed one day late, and therefore was dismissed as untimely.

On remittitur, the Petitioner amended its Third Amended Complaint, which had not been ruled upon or dismissed. The Respondent opposed the amendment, asserting res judicata. Petitioner argued that the Third Amended Complaint was operative and was subject to amendment. However, the Court granted the Respondent's Motion to Strike the Petitioner's Fourth Amended Complaint, and deemed the filing as frivolous. Additionally, the Petitioner was fined $7,142 for filing the Fourth amended complaint, which was a travesty of justice of itself.

Petitioner again appealed, but the appeal was dismissed without prejudice because a direct appeal was not proper. Therefore, Petitioner filed a Fifth Amended complaint. The Court struck the Fifth Amended Complaint also. The Petitioner finally filed Sixth Amended Complaint, but this time incorporating the non-adjudicated Third Amended Complaint.

This was done in hopes that Court would have respect to the non-adjudicated Claims of the Third Amended Complaint. However, the Court struck the Sixth Amended Complaint also, even though the non-adjudicated claims were recited therein. However, this time Petitioner was pleased in the fact that he positioned for Direct Appeal.

On Appeal, the Petitioner relied on O.C.G.A. § 9-12-16, cases from the Georgia Court of Appeals and also cases from the Eleventh Circuit courts of appeals concerning judgments void ab-initio, nullities and superseded complaints. The Decisions relied on from the Georgia Courts of Appeals all held that a superseded complaint is a nullity, and that the most recent complaint is the only operative complaint in the proceeding. The Georgia Supreme Court affirmed the judgments of the Georgia Court of Appeals so holding, and thus, Cert denied. Similarly, the federal court of Georgia also held that a superseded complaint is a nullity, and the most recent complaint is the only operative complaint in the proceeding. These were holdings of the U.S. District Courts and the Eleventh Circuit Court of Appeals.

Surprisingly and extremely disappointing, the Georgia Supreme Court took sides contrary to its prior holdings by affirming the judgment of the Court of Appeals in this case. This erroneous departure is significant.

While there have been many proceedings since the hearing of May 11, 2018, the present controversy and the intervening pleadings are all directed to the Appellant's quest to have his Third Amended complaint heard on the merits. At present, it appears that this is the first time in any jurisdiction which any court has allowed both an Amended Complaint and the complaint which has been superseded by amendment to simultaneously co-exist in the same action at the same time. Generally, in the courts of Georgia and all courts in U.S. jurisdiction, a complaint superseded by amendment is a nullity, and cannot serve any role in the case. As it now stands, Petitioner and Respondent now make their respective cases for either affirming or of reversing that long standing rule in the state of Georgia.

REASONS FOR GRANTING THE PETITION

I. Absence of Clear U.S. Supreme Court Precedent

The United States Supreme Court has not explicitly ruled of the issue of whether a superseded complaint is a nullity. The closest case to providing guidance on the matter was a U.S. Supreme Court decision in 1884. In that case, *Washer v. Bullitt County*, 110 U.S. 558 (1884), the Supreme Court most recently filed complaint was declared the operative complaint.

II. To Resolve Conflict between State and Federal Courts

The Federal Courts of Appeal as well as the federal district courts are in accord. This includes the courts of Georgia. Also concurring is the Eleventh Circuit Court of Appeals. All have held consistently that a superseded complaint is a nullity, and that the most recently filed complaint is the only operative complaint in the proceedings. His has been the holding of the federal courts for many years without exception.

The Georgia Court of Appeals, however, has taken diametrically opposing positions on the same issue. Case in point is the case at bar., In this case, the trial court articulated a contrary position on the question of the nullity of the superseded complaint, and also whether the most recently filed complaint was the only operative complaint. The issue was presented to the Georgia Court of Appeals, but the Court of Appeals chose not to wade in, and affirmed (without opinion) the decision of the trial court. Similarly, the Georgia Supreme Court refused to hear the case. This is extremely troubling because clear precedent for the Petitioner's position is established in a plethora of cases, and

including *Hill v. Bd. of Regents of the Univ. System of Ga.*, 351 Ga. App. 455, 466 (3) (829 SE2d 193) (2019). *Hill* provides that ("As a general rule an amended complaint supersedes and replaces the original complaint, unless the amendment specifically refers to or adopts the earlier pleading.) *See* also, *Quattrocchi v. State of Georgia*, 357 Ga. App. 224 (2020). *Quattrocchi* cites *Hill*. In both of these cases, the Georgia Supreme Court concurred and denied certiorari.

III. To Correct Manifest Injustice

If this honorable Court denies Certiorari. and let this inconsistency remain, it allows the courts of Georgia to pick winners and losers at their own whim. It works a substantial injustice against to party who is not well financed, and great favor to the party who has the ability to continue the litigation.

It is generally held, that absent a ruling (with discussion and reasoning) by a court of appeals, the aggrieved party may bring the action again in any court without any bars, statues of limitations or claim/issue preclusion such as res judicata (O.C.G.A. 9-12-16). Under such a scenario, the revolving door will eventually bankrupt the underfunded part because of attorney fees alone.

In other words, without an explicit ruling on the issue of judgments void ab initio and nullity, both statute and case law provides an open door for continuing to raise the issue ad infinitum. It is a cruelty that begs a remedy. Graning certiorari will provide a long-needed resolution.

IV. To Provide Clarity to Due Process as it Applies to Amended Complaints.

Finally, the Petitioner has a right to be heard on his timely filed Third Amended Complaint. The Complaint, though timely filed, was never heard. Due process was raised about fifty ("50") or more times in the Petitioner's Pleadings**.**

Amplifying the gross unfairness is that the Petitioner was not informed by the trial court of its decision to switch back to the prior second amended complaint. Due to this neglect, the Petitioner was not given notice and opportunity to be heard. To this end, It is a fundamental doctrine of law that a party to be affected by a personal judgment must have his day in court, and an opportunity to be heard. *Renaud v. Abbott*, 116 US 277, 29 L Ed 629, 6 S Ct 1194. Every person is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision on the question. *Earle v McVeigh*, 91 US 503, 23 L Ed 398.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

PERCY L SQUARE
Counsel of Record
2379 Apalachee Crucis Lane
Dacula, Georgia, 30019
(678) 227-8511
plsquare@yahoo.com

SUPREME COURT OF GEORGIA
Case No. S23C1214

January 09, 2024

The Honorable Supreme Court met pursuant to the adjournment. The following order was passed:

SMOKEMASTERS RIBS'N POLLO, INC. v. LIBURN CENTER, LLC.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A23A0046

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Theresa S. Barnes
Theresa S. Barnes

FIRST DIVISION

BARNES, P.J.,

LAND, J., and SENIOR APPELLATE JUDGE PHIPPS

June 27, 2023

NOT TO BE OFFICIALLY REPORTED

IN THE COURT OF APPEALS OF GEORGIA

A23A0046 - SMOKEMASTERS RIBS'N POLLO INCORPORATED

v

LILBURN CENTER LLC.

Barnes, Presiding Judge

In the case, the following circumstances exist and are dispositive of the appeal:

(1) No reversible error of law appears, and an opinion would have no presidential value;

(2) The judgment of the court below adequately explains the decision, and

(3) The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

Judgment affirmed. Land, J., and Senior Appellate Judge Hervert E. Phipps concur.

E-FILED IN OFFICE-SR
CLERK OF SUPERIOR COURT
GWINNET COUNTY, GEORGIA
17-A-04489-1
5/6/2022 5:02PM
TIANA P. GARDNER CLERK

IN THE SUPERIOR COURT OF GWINNETT COUNTY, GA

STATE OF GEORGIA

SMOKE MASTERS RIBS'N POLLO INC Plaintiff, v. LILBURN CENTER, LLC, Defendant.	Civil Action File Number. 17-A-04489-9

ORDER

This Cour has before it the following motions.

10-11-2021 Plaintiff's Motion to Set Aside Order Striking 4th Amended Complaint And Award of Attorney's Fees

10-12-2021 Defendant's Motion to Strike 5th Amended Complaint

10-12-2021 Defendant's Motion to Strike Motion to Set Aside Order Striking Motion to Set Aside Order Striking 4th Amended Complaint

10-18-2021 Plaintiff's Motion for Order of Clarification of Operative Status of 3rd Amended Complaint

10-18-2021 Plaintiff's Conversion of Motion to Set Aside Order Striking 4th Amended Complaint to a Collateral Action in Nullity

11-15-2021 Defendant's Motion to Strike 5th Amended Complaint

11-19-2021 Defendant's Motion for Contempt (Plaintiff's failure to pay attorney's fees)

11-19-2021 Defendant's Motion to Strike Plaintiff's Motion for Order of Clarification of Operative Status of 3rd Amended Complaint

12-16-2021 Action in Nullity in Opposition to Defendant's Motion for Contempt

12-16-2021 Action in Nullity in Opposition to Defendant's Motion to Strike Plaintiff's 6th Amended Complaint

01-07-2022 Collateral Action in Nullity in Opposition to Defendant's Motion to Dismiss

02-03-2022 Plaintiff's Collateral Action in Nullity Under O.C.G.A. § 9-12-16 and Motion to Reset Date of Resumption of Proceedings with Exceptions.

The Court having read and considered all pleadings submitted with the foregoing motions, and having heard oral arguments on April 8, 2022, the Court finds as follows:

I. Procedural Background

Smokemasters filed its original Complaint on May 5, 2017, filed an Amendment to Complaint on July 26, 2017,and filed a Second Amended Complaint on March 19, 2018. Lilburn Center filed a Renewed Motion for Summary Judgment on March 20, 2018. Smokemasters filed a purported responsive pleading[1], and the matter was heard on May 11, 2018. On the eve of the hearing, Plaintiff filed a Third Amended Complaint.

On September 10, 2018, the Court entered an Order granting summary judgment (the "Summary Judgment Order") to Defendant on all but portions of one count of Plaintiff's Complaint, as amended (Count 3, Breach of Contract (One)[Sections 8.01 and 9.02 of the Lease]. The claims that were disposed of are as follows: Count 1 (Constructive Eviction); Count 2 (Breach of the Duty to Make Repairs); Count 4 (Breach of Duty of Good Faith and Fair Dealing (One)); Count 5 (Breach of Contract (Two)[Section 1.05 of the Lease, O.C.G.A. § 44-7-7]; Count 6 (Breach of Duty to Give Proper Notice Before Terminating Lease [O.C.G.A. § 44-7-7]; Count 7 (Breach of Duty of Good Faith and Fair Dealing (Two)); Count 8 (Breach of Duty to Make a Valid Demand for Possession [O.C.G.A. § 44-7-50]; Count 9 (Specific Performance); Count 10 (Punitive Damages); and Count 11 (Litigation Expenses).

---

[1] As noted in the Court's Summary Judgment Order (defined *infra*), "Plaintiff's response to Defendant's Renewed Motion for Summary Judgment is not in the form of a brief and contains no legal argument. Rather, the response consists of a list restating Plaintiff's causes of action and fails to address the legal arguments presented by the Defendant…." *See*, Summary Judgment Order, p.2, n1.

The only portions of Count 3 that remained to be litigated were set forth in the Summary Judgment Order as follows:

> As to the remaining portion of Count 3 alleging that Defendant breached the Lease by refusing to pay, reimburse, or make monetary allowances for repairs as set forth in Section 8.01 of the Lease, the Court finds that there are genuine issues of material fact which preclude summary judgment. Specifically, the Parties' deposition testimony conflicts as to whether Plaintiff was reimbursed pursuant to subsections (a)-(h) of Section 8.01. Therefore, Defendant's Renewed Motion for Summary Judgment is DENIED as to Breach of Contract claims under Count 3 based upon allegations of failure to pay, reimburse, or make monetary allowances for repairs as provided in Section 8.01 of the Lease.

Summary Judgment Order, p. 11.

On October 9, 2018, Smokemasters filed a Notice of Appeal of the Summary Judgment Order.

On November 3, 2018, the Court granted Plaintiff's Application for Writ of Possession.

On October 8, 2019, the Court of Appeals affirmed the Summary Judgment Order.

On June 16, 2020, the Georgia Supreme Court denied Plaintiff's Petition for Certiorari.

On November 16, 2020, Smokemasters filed a Petition for Writ of Certiorari with the United States Supreme Court. Due to the lateness of the filing, the appeal was never docketed.

On or about December 14, 2020, Smokemasters filed its Fourth Amended Complaint.

On January 19, 2021, Lilburn Center filed its Motion to Strike Plaintiff's Fourth Amended Complaint, which Motion was granted by this Court by Order dated March 4, 2021, which Order included an award of attorney's fees in the amount of $7,142.00 (the "Order Striking 4th Complaint).

On March 30, 2021, Smokemasters filed a Notice of Appeal of the Order Striking 4th Complaint, which it amended four times.

On October 8, 2021, the Court of Appeals entered an Order dismissing Smokemasters' Appeal due to Plaintiff's failure to use the interlocutory appeal procedures required for both the Order striking the Fourth Amended Complaint and for the award of attorney's fees.

Also on October 8, 2021, Smokemasters filed its Fifth Amended Complaint. On October 11, 2021, Lilburn Center filed a Motion to Strike Plaintiff's Fifth Amended Complaint. Smokemasters did not respond to this Motion.

Also on October 11, 2021, Smokemasters filed a Dismissal of its Second Amended Complaint (which had been adjudicated on summary judgment on September 10, 2018, leaving portions of Count 3 to be litigated)(the "Original Dismissal"), as well as a Motion to Set Aside Judgment Striking Fourth Amended Complaint.

On October 18, 2021, Smokemasters filed a Motion for Order of Clarification of Operative Status of Plaintiff's Non-Adjudicated Third Amended Complaint.

On October 23, 2021, while Lilburn Center's Motion to Strike the Fifth Amended Complaint was still pending, Smokemasters filed a Sixth Amended Complaint, incorporating the Third Amended Complaint. On November

15, 2021, Lilburn Center filed a Motion to Strike the Sixth Amended Complaint.

On November 19, 2021, Lilburn Center filed a Motion for Contempt due to Smokemasters' failure to comply with the portion of the Order Striking 4th Complaint that required it to pay attorney's fees in the amount of $7,142.00.

On November 20, 2021, Smokemasters filed a First Amended Notice of Voluntary Partial Dismissal Without Prejudice of Portions of Count Three of Plaintiff's Third Amended Complaint Which is Incorporated Into Plaintiff's Sixth Amended Complaint for Damages and Other Equitable

Relief and Collateral Action for Nullity Under O.C.G.A. 9-12-16 and Memorandum of Law in Support Thereof, or in the Alternative, Dismissal With Prejudice ("Second Dismissal").

On November 24, 2021, Smokemasters filed a Second Amended Notice of Voluntary Partial Dismissal Without Prejudice of Portions of Count Three of Plaintiff's Third Amended Complaint Which is Incorporated Into Plaintiff's Sixth Amended Complaint for Damages and Other Equitable Relief and Collateral Action for Nullity Under O.C.G.A. 9-12-16 and Memorandum of Law in Support Thereof, or in the Alternative, Dismissal With Prejudice ("Third Dismissal"). Smokemasters states in the Third Dismissal that **"[t]his amendment changes the dismissal to voluntary dismissal with prejudice."** (emphasis in original). Smokemasters clarified that it is no longer pursuing damages for failure to pay, failure to provide allowances and failure to reimburse Plaintiff for repair expenses or work to be performed by Lilburn Center, which were the only surviving claims in the Summary Judgment Order.

On December 8, 2021, Lilburn Center filed a Motion to Dismiss.

On February 3, 2022, Plaintiff filed a Motion to Reset Date of Resumption of Proceedings with Exceptions.

On February 13, 2022, Plaintiff filed a Motion and Affidavit to Recuse Judge Tracie Cason, which was granted by Order of Recusal on February 15, 2022.

On April 8, 2022, the Honorable George F. Hutchinson, III heard the above-referenced motions.

II. Legal Analysis

A. Plaintiff's Nullity Argument

Since the entry of the Summary Judgment Order, Plaintiff has filed three additional amended complaints and has sought to set aside the Order Striking Fourth Amended Complaint. The crux of Plaintiff's argument is that its filing of the Third Amended Complaint on May 10, 2018, which was the eve of the hearing on Defendant's Renewed Motion for Summary Judgment, renders the Summary Judgment Order null and void because the Order refers to the Second Amended Complaint. Plaintiff contends that the Court of Appeals' affirmation of the Summary Judgment Order is equally null and void, and does not establish law of the case because the Court of Appeals did not issue a published opinion.

Plaintiff acknowledges that it cannot prevail on any of its motions unless the Court finds in its favor on the issue of nullity based on the filing of the Third Amended Complaint.[2] Plaintiff has previously argued that the decision rendered by the trial court on the Renewed Summary Judgment is null

[2] Plaintiff has inconsistently requested that the Court reinstate the Third or Fourth Amended Complaint as the operative pleading, but for the reasons stated herein, none of Plaintiff's claims can be relitigated under any of the amended complaints.

and void because it was based on the Second Amended Complaint rather than the Third Amended Complaint. Plaintiff has also previously argued that the trial court's decision is void because it was rendered *sua sponte* on grounds and issues that were not raised by the parties, thereby preventing Plaintiff from being heard on those issues.

This court has rejected these arguments in its Order Striking 4th Complaint. The doctrines of res judicata and collateral estoppel bar Plaintiff's attempts to re-litigate claims and issues that were already raised, or which could have been raised. *See,* O.C.G.A. § 9-12-40; *see also, Flagg Energy Dev. Corp. v. General Motors*, 235 Ga. App. 540, 542 (1998); *QOS Networks Ltd v. Warburn Pincus and Co.*, 294 Ga. App. 528 (2008).

Plaintiff is equally prohibited from revising its claims by the law of the case doctrine, pursuant to which this Court is bound by the decision issued by the Court of Appeals. *Falanga v. Kirschner & Venker, PC*, 298 Ga. App. 672, 673 (2009); *see also,* O.C.G.A. § 9-11-60(h). Plaintiff mentioned in its appellate brief that the Third Amended Complaint was the operative pleading in the case and that the trial court erroneously designated the Second Amended Complaint as the operative pleading. However, Plaintiff did not enumerate this issue as an error and did not include any argument in its appellate brief to support the statement. The burden is on Plaintiff as appellant to show error affirmatively in the record, and "appellate judges should not be expected to take pilgrimages into records of such error without the compass of citation and argument." *Tucker v. Crystal Clear Luxury Pools, Inc.*, 361 Ga. App. 369, 370 (2021).

For these reasons, Plaintiff's cannot re-litigate the issues surrounding the filing of the Third Complaint prior to

the entry of the Summary Judgment Order, and it cannot file any further amended complaints in this action.

B. Defendant's Motion to Dismiss

Plaintiff filed its First Dismissal on October 10, 2021, specifically including "any claims from the Second Amended Complaint which have considered (*sic*) by either the court of the Defendant as remaining." The Summary Judgment Order denied summary judgment only as to a portion of Plaintiff's Breach of Contract claim "based upon allegations of failure to pay, reimburse, or make monetary allowances for repairs…" On November 20, 2021, Plaintiff filed its Second Dismissal, dismissing those portions of the Third Amended Complaint that allege and seek damages for failure to pay, failure to provide allowances, and failure to reimburse Plaintiff (the "Breach of Contract claims"). On November 23, 2021, Plaintiff filed its Third Dismissal, clarifying that the dismissal of its Breach of Contract Claims is with prejudice. Thus, regardless of which Complaint is being referenced, there is no question that Plaintiff repeatedly dismissed its Breach of Contract claims, and did so with prejudice. O.C.G.A. § 9-11-41(a)(3).

Because Plaintiff cannot re-litigate any of the claims addressed in the Summary Judgment Order which the Court of Appeals affirmed, and because Plaintiff dismissed the only remaining Breach of Contract claims with prejudice, no claims remain pending before the Court. Defendant's Motion to Dismiss is hereby GRANTED.

C. Defendant's Motion for Contempt

Defendant's Motion for Contempt seeks sanctions against Plaintiff due to its failure to pay $7,142.00 in attorney's fees that the Court awarded in its Order Striking 4th Complaint. Plaintiff contends that it should not have to pay the fees because all orders entered following the filing of

the Third Amended Complaint are null and void. As addressed hereinabove, the Court rejects Plaintiff's arguments based on nullity. The Court of Appeals dismissed Plaintiff's appeal of the Order Striking 4th Complaint due to its failure to follow the interlocutory appellate procedure. The Order therefore stands, and Plaintiff has made no attempt to comply with said Order, even after receiving two warnings from Defendant that it would pursue a motion for contempt if Plaintiff failed to pay the fee award. Defendant's Motion for Contempt is hereby GRANTED. Plaintiff shall pay an additional $500 per day from the date of this Order until it complies with the Order Striking 4th Complaint awarding Defendant $7,142.00 in attorney's fees. SO ORDERED, this the 5 day of May, 2022

s/ George F. Hutchingson, III
The Honorable Georg F. Hutchinson III
Superior Court of Gwinnett County

Prepared and submitted by:

DEUTCHMAN LAW, LLC

s/ *Jill A. Deutchman*
Jill A. Deutchman
Georgia Bar No. 212715
3340 Peachtree Rd. NE, Suite 2570
Atlanta, GA 30326
404.994.4944
Counsel for Lilburn Center, LLC

IN THE SUPERIOR COURT OF GWINNETT COUNTY,

STATE OF GEORGIA

SMOKE MASTERS RIBS'N POLLO INC Plaintiff, v. LILBURN CENTER, LLC, Defendant.	Civil Action File Number. 17-A-04489-9

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing pleading by Statutory Electronic Service to the following to ensure proper delivery:

Percy L. Square
Plsquare@yahoo.com

This 18th day of January, 2021

s/ *Jill A. Deutchman*

Jill A. Deutchman

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

SMOKE MASTERS RIBS'N POLLO INC Plaintiff, v. LILBURN CENTER, LLC, Defendant.	Civil Action File Number. 17-A-04489-9

ORDER ON DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT AND OTHER PENDING MOTIONS

I. Background and Procedural Posture

This case arises from a dispute between the Plaintiff/Tenant and Defendant/Landlord regarding a commercial lease ("the Lease") for the Plaintiff to operate a restaurant located at Lilburn Market Center, 4805 Lawrenceville Highway, Suite 104, Lilburn, Georgia 30047 ("the Premises"). The Plaintiff filed its original Complaint on May 5, 2017, filed an Amendment to Complaint on July 26, 2017, and filed a Second Amended Complaint for Damages and Equitable Relief on March 19, 2018 ("Second Amended Complaint"). Plaintiff asserts the following claims in its Second Amended Complaint, which is currently the operative pleading in this case:

1.Count 1: Constructive Eviction;

2.Count 2: Breach of the Duty to Make Repairs [O.G.G.A. §§ 44-7-13 and 44-7-14, Section 8.01 of the Lease];

3. Count 3: Breach of Contract (One) [Sections 8.01 and of the Lease];

4.Count 4: Breach of Duty of Good Faith and Fair Dealing.

5. Count 5: Breach of Contract (Two) [Section 1.05 of the Lease, O.C.G.A. § 44-7-7];

6. Count 6: Breach of Duty to Give Proper Notice Before Terminating Lease (O.C.G.A. § 44-7-7];

7. Count 7: Breach of Duty of Good Faith and Fair Dealing (Two);

8. Count 8: Breach of Duty to Make a Valid Demand for Possession (O.C.G.A. § 44-7-50];

9. Count 9: Specific Performance;

10. Count 10: Punitive Damages; and

11. Count 11: Litigation Expenses [O.C.G.A. § 13-6-11].

Currently before the Court is the Defendant's Renewed Motion for Summary Judgment filed on March 20, 2018. Plaintiff filed its responsive pleadings[3] on April 23, 2018.

---

[3] The Court notes that the Plaintiff's response to the Defendant's Renewed Motion for Summary Judgment is not in the form of a brief and contains no legal argument. Rather, the response essentially consists of a list restating Plaintiff's causes of action and fails to address the legal arguments presented by the Defendant. Nevertheless, the Court has

Oral argument on the matter was heard on May 11, 2018, and all parties were represented by their respective counsel at the proceeding. Also pending before the Court are the following motions[4]:

1. Plaintiff's Motions in Limine filed on March 19, 2018;

2. Plaintiff's Motion for Discovery Sanctions filed on March 20, 2018;

3. Plaintiff's Emergency Motion for Order Disregarding Defendant's Renewed Motion for Summary Judgment filed on March 22, 2018;

4. Defendant's Motion for Attorney's Fees filed on April 17, 2018; and

5. Defendant's Motion to Strike Pleadings filed on April 30, 2018.

Having considered argument of counsel, along with all relevant matters of record in this case, the Court finds as follows.

---

considered the Plaintiff's response, along with Plaintiff's statement of additional material facts, in deciding the Defendant's Renewed Motion for Summary Judgment to the extent that Plaintiff cites to disputed material facts supported by the record in this case.

[4] In addition to the listed motions, Plaintiff also moved the Court to disqualify Defendant's counsel. However, that motion was resolved at the March 21, 2018 pretrial conference in this case by stipulation of the Parties that Defendant would not seek to shift blame to its counsel as an affirmative defense or in apportioning liability as to claims involving the first dispossessory action between the Parties in this case.

I. Standard of Review

"To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56 (c)." *Hardin v. Hardin,* 801 S.E.2d 774, 778 (2017) (quoting *Lau's Corp. v. Haskins,* 261 Ga. 491, 491 (405 S.E.2d 474) (1991)). "[O]nce a [moving party] points out that there is an absence of evidence to support the [nonmoving party's] case, the burden then shifts to the [nonmoving party], who 'must point to specific evidence giving rise to a triable issue.'" *Pfeiffer v. Georgia Dep't of Transp.,* 275 Ga. 827, 828-29, 573 S.E.2d 389, 391 (2002) (quoting *Lau's Corp.,* supra). "[A] de novo standard of review [applies] to an appeal from a grant or denial of summary judgment ...." *Ashton Atlanta Residential, LLC v. Ajibola,* 331 Ga. App. 231, 232, 770 S.E.2d 311,312 (2015).

III. Count 1 - Constructive Eviction

Although many of the arguments asserted by the Defendant in support of its Renewed Motion for Summary Judgment are based upon facts in the record that remain disputed, the Court has considered whether each of Plaintiffs claims can survive summary judgment given the nature of the claims in light of the Court's construction of relevant contract terms. Even where there is great conflict between the facts alleged by the Parties,

> "[t]he construction of a contract is a question of law for the court."Contract construction follows three steps: "The trial court must first decide whether the contract language is ambiguous; if it is ambiguous, the trial court

> must then apply the applicable rules of construction; if after doing so the trial court determines that an ambiguity still remains, the jury must then resolve the ambiguity."[3] Thus, the jury does not become involved in the process, even if the contract is difficult to construe, until there appears an ambiguity in the contract which cannot be resolved by the court's application of the rules of construction set forth in part in O.C.G.A. § 13-2-2.

Parkside Ctr., Ltd. v. Chicagoland Vending, Inc., 250 Ga. App. 607, 616, 552 S.E.2d 557, 565 (2001) (footnotes omitted).

In Count 1 of the Second Amended Complaint, Plaintiff contends that Defendant's alleged failure to timely complete build-out of the Premises caused Plaintiff to be constructively evicted from June 1, 2013 to May 6, 2015, and that Plaintiff is entitled to damages including lost profits and reimbursement of rent. Although Plaintiff seeks to assert constructive eviction as a claim for damages, it is an affirmative defense to the obligation to pay rent rather than an independent cause of action. "Constructive eviction is a specialized defense in rent cases grounded on general principles of contract law respecting failure of consideration, and may involve either total or partial failure of consideration." *Piano & Organ Ctr., Inc. v. Southland Bonded Warehouse, Inc.,* 139 Ga. App. 480,481,228 S.E.2d 615,617 (1976).

Furthermore, Plaintiff agreed to take possession of the Premises "as is" pursuant to Sections 1.02 and 8.01 of the Lease. The fact that Plaintiff cites Defendant's failure to complete build out as the cause for its purported constructive eviction claim shows that the at basis of the

Plaintiffs claim-namely that the Premises had not yet been built out-was a condition that existed at the time the Parties entered into the Lease agreement. A tenant who takes possession of the premises "as is"

> is precluded by the lease from claiming that [it] was constructively evicted by a condition that existed at the time [it] signed the lease. Constructive eviction takes place and a tenant is relieved from paying rent when "the landlord whose duty it is to keep [the premises] in a proper state of repair allows it to deteriorate to such an extent that it is an unfit place for the tenant to carry on the business for which it was rented, and when it cannot be restored to a fit condition by ordinary repairs which can be made without unreasonable interruption of the tenant's business. [Cits.]"

Snipes v. Halpern Enterprises, Inc., 160 Ga. App. 207, 208, 286 S.E.2d 511, 512-13 (1981) (quoting *Overstreet v. Rhodes,* 212 Ga. 521, 523, 93 S.E.2d 715 (1956)). In the instant case, the undisputed fact that Defendant's build out had not yet occurred when the Parties entered into the Lease agreement precludes the possibility that Plaintiff was constructively evicted due to the deterioration of conditions that existed at the time Plaintiff took possession of the Premises.

Because constructive eviction is a defense rather than an independent cause of action, and because the Plaintiff cannot make the required showing that an existing condition fell into disrepair based on the record in this case even if constructive eviction were available as a cause of action, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count # 1 of the

Second Amended Complaint.

IV. Count 2 - Breach of the Duty to Make Repairs

In Count 2 of its Second Amended Complaint, Plaintiff asserts a claim for Breach of the Duty to Make Repairs. Specifically, Plaintiff contends that:

> [p]ursuant to O.C.G.A. § 44-7-13, Landlord was required to make repairs to the premises in the manner set forth in Section 8.01 of the Lease. Landlord failed to make repairs to the premises in the manner set forth in Section 8.01 of the Lease. Pursuant to O.C.G.A. § 44-7-14, Landlord is liable to Tenant for this failure.[5]

Plaintiff seeks damages pursuant to Count 2 including lost profits.

Although the Plaintiff contends that the Defendant's duty under O.C.G.A. § 44-7-13 was "to make repairs to the premises in the manner set forth in Section 8.01 of the Lease", the statute simply states that a "landlord must keep the premises in repair. He shall be liable for all substantial improvements placed upon the premises by his consent." Plaintiff further relies on O.C.G.A. § 44-7-14, which provides that

> [h]aving fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising

---

[5] Second Amended Complaint, ¶¶ 30-32

> from defective construction or for damages arising from the failure to keep the premises in repair.

"A landlord's [tort] liability **to a third person** who is injured on property which was relinquished by rental or under a lease is determined by OCGA § 44-7-14." *Martin v. Johnson-Lemon,* 271 Ga. 120, 123, 516 S.E.2d 66, 68 (1999) (quoting *Colquitt v. Rowland,* 265 Ga. 905, 906, 463 S.E.2d 491 (1995)) (emphasis added). A landlord's duty to repair "does not include a duty of maintenance. Rather, the term 'repair' 'contemplates an existing structure which has become imperfect, and means to supply in the original structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be.'" *Gainey v. Smacky's Investments, Inc.,* 287 Ga. App. 529, 530, 652 S.E.2d 167, 169-70 (2007).

Together, O.C.G.A. § 44-7-13 and § 44-7-14 provide for a landlord's potential liability to persons who are non-parties to a lease agreement. A landlord's duty to repair under these statutes is prospective from the date the tenant takes possession and consists of the duty to restore existing structures to their original condition. In contrast, Section 8.01 of the Lease provides for the following "Landlord's Work":

> The Demised Premises is being delivered to the Tenant **"As-1s".** [6]
> There are no guaranties as to the fitness of purpose or warranty during the term, or any renewal thereof. The Landlord shall do a one-time inspection and service, if required, of the

[6] Emphasis in original

> HVAC system, electrical and plumbing system. The Landlord shall provide the following:
>
> a. Either tile, and or provide for an allowance for tile at the rate of $3 per square foot;
> b. Replace and/or provide an allowance of $350 to replace the ceiling tiles;
> c. Electrical allowance of $750;
> d. Plumbing repairs allowance of $1,000;
> e. Provide an allowance of $500 toward the reinstallation of the cooler;
> f. Reinstall the hot-water heater (in addition to plumbing repairs);
> g. Repair all sheetrock; and
> h. Patch the holes in the walls and paint the walls either white or a neutral color.

In examining the Landlord's contractual duties set forth in Section 8.01 of the Lease as cited by the Plaintiff in Count 2 of its Second Amended Complaint, none pertain to the restoration of existing structures to their original condition as of the date the Parties entered into the Lease agreement. Thus, the Section 8.01 duties are purely contractual in nature and the alleged violation of these duties would not independently give rise to a tort claim under O.C.G.A. § 44- 7-13 or § 44-7-14.

In fact, the undisputed terms of the Lease provide that the Parties agreed to shift Defendant's duty to repair to the Plaintiff per the express terms of the Lease. Section 1.02 of the Lease provides in pertinent part that

> Tenant acknowledges that it has fully inspected, and accepts, the Demised Premises in its present condition. Tenant warrants,

> acknowledges and agrees that the Tenant is leasing the Demised Premises in an **"As-ls"**[7] condition and with **"All Faults"**[8]**,** and especially and expressly without warranty, representation and/or guaranty, either express or implied, of any kind, nature or type whatsoever from or on behalf of the Landlord. The Landlord does not make any representations and/or warranty with regards to the compliance with any environmental protection, population or land use laws, rules, regulations, orders or requirements, including those involving asbestos and/or radon. Tenant acknowledges that it had full opportunity to inspect the Demised Premises in this regard, and hereby waives, releases and discharges any claims whatsoever it has, or may have, against the Landlord with respect to the condition of the Demised Premises, either patent or latent.

The Lease further provides in Sections 10.01 and 10.02 that, while the "Landlord shall keep and maintain the exterior walls, roof and structural elements of the Shopping Center, with such also
being referred to and defined as 'Common Areas'",

> Tenant shall keep and maintain in good order, condition and repair (including replacement of parts and equipment if necessary) the Demised Premises and every part thereof and any and all appurtenances thereto wherever located, including, but without limitation, the exterior and interior portion of all doors, door checks,

---

[7] Emphasis in original
[8] Emphasis in original

> windows, plate glass, store front, all plumbing and sewage facilities within the Demised Premises, including free flow up to the main sewer line, fixtures, heating and air conditioning and electrical systems (whether or not located in the Demised Premises), sprinkler systems, fire extinguishers, walls, floors and ceilings. ... Tenant shall repair or replace the units when deemed necessary by Tenant at the Tenant's reasonable discretion.... Tenant to provide Landlord, upon termination of its tenancy, at its sole cost and expense, with certificates from licensed contractors evidencing that the heating, cooling, electrical and plumbing systems are in good repair and operating conditions.[9]

The Court of Appeals has held that "the owner of property not used as a 'dwelling place' - as was the case here - can contract to avoid the duties to repair and improve the property set forth in O.C.G.A. § 44-7-13 and O.C.G.A. § 44-7-14." *Groutas v. McCoy,* 219 Ga. App. 252, 254, 464 S.E.2d 657, 659 (1995) (citing *Gaffney v. EQK Realty Investors,* 213 Ga.App. 653, 445 S.E.2d 771 (1994)); *see also Rainey v. 1600 Peachtree, L.L.C.,* 255 Ga. App. 299, 300, 565 S.E.2d 517, 519 (2002) and *Johnson v. Loy,* 231 Ga. App. 431, 435, 499 S.E.2d 140, 143 (1998) ("O.C.G.A. § 44-7-2(b)(2), which prohibits landlords from waiving, assigning, transferring, or otherwise avoiding the rights, duties, and remedies provided by O.C.G.A. § 44-7-14, applies only to property to be used 'as a dwelling place.' ... [T]here is no other comparable statute for commercial premises.").

Because the acts or omissions alleged in Count 2 do not

---

[9] Sections 10.02.A and 10.02.E of the Lease

constitute "repairs" as contemplated in O.C.G.A. §44-7-13 and§ 44-7-14, and because any such duties to repair under the cited statutes were shifted to the Plaintiff/Tenant by agreement of the Parties, the Plaintiff is essentially seeking tort damages in Count 2 solely for Defendant's alleged violation of its contractual duties under Section 8.01 of the Lease. However,

> [i]t is well settled that mere failure to perform a contract does not constitute a tort. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law. This is true even in situations where the contract is breached in bad faith, where the courts have consistently held that punitive damages are not available because there has been no tort. Here, a thorough and careful review of the well- pled factual allegations of (the plaintiff's] complaint and amended complaint, and the written contract itself, shows that all the duties which [the plaintiff] complains were breached by [the defendant] arise directly from, not independent of, ... [the] contract.

ServiceMaster Co., L.P. v. Martin, 252 Ga. App. 751, 754, 556 S.E.2d 517, 521 (2001); *see also Nw. Plaza, LLC (MI) v. Ne. Enterprises, Inc.,* 305 Ga. App. 182, 192, 699 S.E.2d 410, 418 (2010), and Lane v. Corbitt Cypress Co., Inc., 215 Ga. App. 388, 389, 450 S.E.2d 855, 857 (1994) ("'A tort is the unlawful violation of a private legal right other than a mere breach of contract, express or implied.' (Emphasis supplied.) O.C.G.A. § 51-1-1. 'Generally, a mere breach of a valid contract amounting to no more than a failure to perform in accordance with its terms does not constitute a tort or evens

authorize the aggrieved party to elect whether he will proceed ex contractu or ex delicto."'). For the reasons discussed above, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 2 of Plaintiff's Second Amended Complaint.

V. Count 3 -Breach of Contract (One)

Plaintiff contends in Count 3 of its Second Amended Complaint that the Defendant "breached the Lease by not completing all of the work set forth in Section 8.01 within the time period contemplated in the Lease (or alternatively, within a reasonable time)", "refusing to pay/reimburse for the repairs contemplated in Section 8.01 of the Lease", "refusing to make some or all of the monetary allowances that are set forth in that Section", and "by unreasonably delaying in giving Tenant written approval to make HVAC, mechanical, electrical, and plumbing repairs" per Section 9.02 of the Lease.[10]

> "The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." (Punctuation and footnote omitted.) *Norton v. Budget Rent A Car System,* 307 Ga.App. 501, 502, 705 S.E.2d 305 (2010).A breach occurs if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement **as specified in the contract;** or does some act that renders performance impossible. *Bd. of Regents of the Univ. System of Ga. v. Doe,* 278 Ga.App. 878, 887(3), 630 S.E.2d 85 (2006).

---

[10] Second Amended Complaint, ¶¶ 35-38

UWork.com, Inc. v. Paragon Techs., Inc., 321 Ga. App. 584, 590, 740 S.E.2d 887, 893 (2013) (emphasis added).

Because Plaintiffs cause of action in Count 3 is for breach of contract, Plaintiff must show that Defendant failed to perform a duty "as specified in the contract". *Id.* Accordingly, if the duty alleged to have been breached is not one that is specified in the contract, a cause of action for breach of contract does not lie. In the instant case, Section 8.01[11] of 30 the Lease does not contain a time period within which the Landlord/Defendant must provide the items listed in subsections (a)-(h). Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to the portion of Count 3 regarding Defendant's alleged lack of timeliness in the performance of its Section 8.01 duties as a breach of the

---

[11] Section 8.01 in its entirety provides as follows:
The Demised Premises is being delivered to the Tenant **"As-Is".** There are no guaranties as to the fitness of purpose or warranty during the term, or any renewal thereof. The Landlord shall do a one-time inspection and service, if required, of the HVAC system, electrical and plumbing system.
The Landlord shall provide the following:
a. Either tile, and or provide for an allowance for tile at the rate of $3 per square foot;
b. Replace and/or provide an allowance of $350 to replace the ceiling tiles;
c. Electrical allowance of $750;
d. Plumbing repairs allowance of $1,000;
e. Provide an allowance of $500 toward the reinstallation of the cooler;
f. Reinstall the hot-water heater (in addition to plumbing repairs);
g. Repair all sheetrock; and
h. Patch the holes in the walls and paint the walls either white or a neutral color.

contract. Furthermore, Section 9.02[12] of the Lease pertains to the Plaintiffs obligations regarding removal of fixtures and other improvements from the Premises and does not set forth any duties incumbent upon the Defendant. Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to the portion of Count 3 regarding Defendant's alleged obligations to provide written approval for repairs under Section 9.02 of the Lease.

As to the remaining portion of Count 3 alleging that Defendant breached the Lease by refusing to pay, reimburse, or make monetary allowances for repairs as set forth in Section 8.01 of the Lease, the Court finds that there are genuine issues of material fact which preclude summary judgment. Specifically, the Parties' deposition testimony conflicts as to whether Plaintiff was reimbursed pursuant to subsections (a)-(h) of Section 8.01 of the Lease. Therefore, Defendant's Renewed Motion for Summary Judgment is DENIED as to Breach of Contract claims under Count 3 based upon allegations of failure to pay, reimburse, or make monetary allowances for repairs as provided in Section 8.01 of the Lease.

---

[12] Section 9.02 of the Lease regarding Installation &Removal by Tenant" provides in its entirety as follows:

All alterations, decorations, additions and improvements including lighting fixtures made by Tenant shall be deemed to have attached to the Leasehold and to have become the property of Landlord upon such attachment, and upon expiration of this Lease or any renewal Term thereof, the Tenant shall not remove any of such alterations, decorations, additions and improvements, except trade fixtures installed by Tenant may be removed if all Rent due herein is paid in full and Tenant is not otherwise in default hereunder; provided, however, that Landlord may designate by written notice to Tenant those alterations and additions which shall be removed by Tenant at the expiration or termination of the Lease and Tenant shall promptly remove the same and repair any damage to the Demised Premises caused by such removal.

VI. Count 4 - Breach of Duty of Good Faith and F Dealing (One), and Count 7 - Breach of Duty of Good Faith and Fair Dealing (Two)

Plaintiff seeks damages under Counts 4 and 7 for breach of duty of good faith and fair dealing, alleging that Defendant acted in bad faith in breaching the Lease as asserted in Counts 2 and 3, and breaching the duty to provide 60 days notice before terminating the Lease as asserted in Counts 5 and 6.

"Under Georgia law, 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'" *ULQ, LLC v. Meder,* 293 Ga. App. 176, 179, 666 S.E.2d 713, 717 (2008) (quoting *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.,* 281 Ga. App. 450, 451, 636 S.E.2d 139, 141 (2006)). However, the limited set of exceptions to this rule of good faith and fair dealing includes leases such as the contract that is the subject of this case. *See Hunting Aircraft, Inc. v. Peachtree City Airport Auth.,* 281 Ga. App. 450, 454, 636 S.E.2d 139, 142 (2006) (citing leasehold contracts as "an exception to the well-recognized and overarching rule that good faith and fair dealing are implied in all contracts").

Even if the rule of good faith and fair dealing applied to leasehold contracts, Plaintiffs Count 4 and Count 7 would fail once the underlying breach of contract claims were dismissed. In the instant case, Counts 2, 5 and 6 are dismissed for the reasons discussed in Sections IV, VII and VIII of this Order, and only one portion of Count 3 (regarding reimbursements pursuant to Section 8.01 of the Lease as discussed in Section V of this Order) survives summary judgment. As such, Plaintiffs derivative claims in Count 4 and 7 that are based upon the dismissed underlying counts would fail as a matter of law, even if breach of duty of good

faith and fair dealing were an available claim in cases involving leasehold contracts.

> There is no independent cause of action for violation of a duty of good faith and fair dealing in the performance of a contract "apart from breach of an express term of the contract. [Cit.]" *Morrell v. Wellstar Health Sys.,* 280 Ga.App. 1, 5(2), 633 S.E.2d 68 (2006). [Where] the trial court properly dismissed the breach of contract claim... , the claim for breach of duty of good faith and fair 3 dealing under the contract was also properly dismissed since there is no such independent cause of action apart from the breach of contract claim.

Bankston v. RES-GA Twelve, LLC, 334 Ga. App. 302,304, 779 S.E.2d 80, 82 (2015). Therefore,upon the dismissal of the breach of contract claims upon which Plaintiff rests Count 4 and Count 7, Plaintiffs claims based on duty of good faith and fair dealing cannot stand as independent causes of action.

Because leasehold contracts are exceptions to the rule of good faith and fair dealing, and because all but one of the breach of contract claims underpinning Counts 4 and 7 are dismissed, the Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 4 and Count 7 of the Second Amended Complaint.

VII. Count 5 - Breach of Contract (Two)

Plaintiff contends in Count 5 that Defendant is liable for breach of contract for violating Lease Section 1.05 and O.C.G.A. § 44-7-7. Although Plaintiff cites to Section 1.05 of

the Lease as a basis for his claim for breach of contract, Section 1.05[13] is a holdover clause that sets forth Tenant's duties in the event of a holding over and does not contain any provision for notice prior to the Landlord's termination of the lease. Plaintiff further contends that the Lease requires a 60-day notice period prior to termination of a holdover tenancy because "O.C.G.A. § 44-7-7, is incorporated into this Section of the Lease as a matter of law."[14] As discussed above in Section V of this Order, one of the essential elements of a claim for breach of contract is the non- performance of a duty that is specified in the contract. *See UWork.com, Inc. v. Paragon Techs., Inc.,* 321 Ga. App. 584, 590, 740 S.E.2d 887, 893 (2013). Plaintiff has neither alleged nor directed the Court to any record evidence showing that Defendant breached the specific provisions of Section 1.05 of the Lease, which is the only Lease provision cited in Count 5 for breach of contract. Accordingly, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 5 of the Second Amended Complaint.

VIII. Count 6 - Breach of Duty to Give Proper Notice Before Terminating Lease, Count 8 - Breach of Duty to Make a Valid Demand for Possession

---

[13]Section 1.05 of the lease provides in its entirety as follows:
It is hereby agreed that in the event of Tenant holding over after the termination of this Lease, without dispute, thereafter the tenancy shall be from month to month in the absence of a written agreement to the contrary, and Tenant shall pay to Landlord an occupancy charge equal to One Hundred Twenty-Five Percent (125%) of the Base Rent, plus all other charges payable by Tenant under this Lease, for each month from the expiration or termination of this Lease until the date the Demised Premises are delivered to Landlord in the condition required herein, and Landlord's right to damages for such illegal occupancy shall survive.

[14] Second Amended Complaint, p. 6. ¶ 45.

Count 6 and Count 8 seek damages for the Defendant's alleged failure to provide statutory notice prior to terminating the Lease and alleged failure to make statutory pre-litigation demand. However, a landlord's failure to give at least 60 days notice prior to terminating a tenancy at will and failure to make demand are defenses to dispossessory actions rather than standalone causes of action for which a tenant may seek damages. "Tenants at will are entitled to 60 days' notice of termination under O.C.G.A. § 44-7-7, and a demand for possession following the expiration of this time period is a condition precedent to the institution of dispossessory proceedings under O.C.G.A. § 44-7-50(a)." *Drury v. Sec. State Bank,* 328 Ga. App. 39, 41, 759 S.E.2d 635, 638 (2014) (citing *Trumpet v. Brown,* 215 Ga.App. 299, 300(2), 450 S.E.2d 316 (1994)). The Plaintiff in this case has not cited any authority supporting its assertion of the 60-day notice or demand requirements as separate causes of action, and the Court is not aware of any such authority. Because the statutes requiring landlords to provide 60 days notice before terminating an at-will tenancy and to make demand before filing a dispossessory do not provide a cause of action outside the context of defending a dispossessory action, the Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 6 and Count 8 of the Second Amended Complaint.

IX. Count 9 - Specific Performance

In Count 9, the Plaintiff contends it should be allowed an additional three year term under the current Lease terms in light of the Defendant's alleged delay in the performance of its contractual duties.[15] Specific performance is an available equitable remedy in cases involving lease of real property.

---

[15] Second Amended Complaint, ¶ 77.

> The object of equity is to place the parties in the same position they would have occupied had a breach not occurred. *Golden v. Frazier,* 244 Ga.
>
> 685, 261 S.E.2d 703 (1979). Contracts for the lease of properties are enforceable by specific performance just as contracts for the sale of property. *F. & W Grand Five-Ten-Twenty-Five Cent Stores, Inc. v. Eiseman,* 160 Ga. 321, 127 S.E. 872 (1925).

Peachtree On Peachtree Jnv'rs, Ltd. v. Reed Drug Co., 251 Ga. 692, 696, 308 S.E.2d 825, 829 (1983). However, "equity will be denied if there is a remedy at law for damages". *Liniado v. Alexander,* 199 Ga. App. 256, 258, 404 S.E.2d 602, 604 (1991) (noting the exception for contracts for the *sale* of real property). The Georgia Supreme Court further held in *Peachtree, supra,* that even where a commercial lease was wrongfully terminated by the landlord, the tenant was not entitled to specific performance of the remaining lease term (i.e. right to occupy the premises beyond the lease termination date for a period equal to the time that remained at the point of wrongful termination) because an award of money damages for the landlord's violation of lease provisions constituted an adequate remedy at law.

In the instant case, Plaintiff seeks monetary damages for Defendant's alleged breaches of its contractual duties in addition to specific performance under the original Lease terms. The Court notes that, during the pendency of this case and related litigation, Plaintiff has already occupied and operated its business at the Premises beyond the termination date specified in the Lease (i.e. June 30, 2016) in excess of the disputed 22-month period of Plaintiffs alleged inability to operate its business due to Defendant's

delay.[16] However, the Plaintiff would not have been entitled to equitable relief through specific performance in any event because monetary damages, if any, pursuant to its breach of contract claim would provide Plaintiff with an adequate remedy at law and preclude the award of specific performance. Accordingly, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 9 of the Second Amended Complaint.

X. Count 10 - Punitive Damages

Plaintiff seeks punitive damages in Count 10 of its Second Amended Complaint. However, "[p]unitive damages are not available in breach of contract claims." *Roberts v. JP Morgan Chase Bank, Nat'! Ass'n,* 342 Ga. App. 73, 79, 802 S.E.2d 880, 886 (2017) (quoting *ServiceMaster Co. v. Martin,* 252 Ga. App. 751, 757 (2) (c), 556 S.E.2d 517 (2001) and noting that "'[f]raud, if found, is tortious conduct' and will justify punitive damages."). "[E]ven in situations where the contract is breached in bad faith, . .. courts have consistently held that punitive damages are not available [where] there has been no tort." *ServiceMaster Co., L.P. v. Martin,* 252 Ga. App. 751, 754, 556 S.E.2d 517,521 (2001).

In the instant case, the only cause of action remaining after the Court's ruling on the Defendant's Renewed Motion for Summary Judgment is a portion of Count 3 for breach of contract. Because Plaintiff is proceeding with a single count for breach of contract and has no surviving tort claims upon which to base an award of punitive damages, the Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 10 of the Second Amended Complaint.

XI. Count 11 - Litigation Expenses

---

[16] *See* Second Amended Complaint, ¶73.

In Count 11, Plaintiff seeks to recover the expenses of litigation from the Defendant. However, "[a] recovery of

O.C.G.A. § 13-6-11 attorney's fees in a contract action must be based upon evidence which shows more than a mere breach of contract." *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.,* 230 Ga. App. 455, 457, 496 S.E.2d 546, 550 (1998) (quoting *Williams Tile & Marble Co., Inc. v. Ra-Lin & Associates, Inc.,* 206 Ga. App. 750, 752- 753, 426 S.E.2d 598 (1992)). The Court of Appeals further held in *Pulte* that, where there was no evidence of bad faith by the party alleged to have breached a contract, "the trial court erred in denying [that party's] motion for directed verdict as to its non-liability for O.C.G.A. § 13-6-11 attorney fees." *Pulte, supra,* at 457.

The Plaintiff in this case has presented no competent record evidence showing that Defendant's actions or inactions pursuant to the Lease terms were anything more than alleged breaches of contract or that they involved bad faith. Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count **11** of the Second Amended Complaint.

XII. Conclusion

For the reasons discussed above, the Defendant's Renewed Motion for Summary Judgment is hereby DENIED as to that portion of Plaintiffs Count 3 breach of contract claim regarding failure to pay, reimburse, or make monetary allowances for repairs as provided in Section 8.01 of the Lease. The Defendant's Renewed Motion for Summary Judgment is further GRANTED as to all remaining Counts, including those portions of Count 3 not described in the preceding sentence of this Order.

The Court further DENIES the Plaintiffs Motions in Limine as moot without prejudice to Plaintiff renewing any motions that apply to the remaining claim in this case at the appropriate time. Plaintiffs Motion for Discovery Sanctions, Plaintiffs Emergency Motion for Order Disregarding Defendant's Renewed Motion for Summary Judgment, Defendant's Motion for Attorney's Fees, and Defendant's Motion to Strike Pleadings are also DENIED. To the extent that the Plaintiff seeks to pursue its motion to disqualify Defendant's counsel which appears to have been previously resolved by agreement of counsel, that motion is also DENIED.

SO ORDERED this the 10th day of September, 2018.

s/ Keith Miles
Hon. Keith Miles
Judge, Superior Court of Gwinnett County
By Designation

cc: All parties and counsel of record

IN THE SUPERIOR COURT OF GWINNETT COUNTY,
GA
STATE OF GEORGIA

SMOKE MASTERS RIBS'N POLLO INC Plaintiff, v. LILBURN CENTER, LLC, Defendant.	Civil Action File Number. 17-A-04489-9

ORDER ON DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT AND OTHER PENDING MOTIONS

II. Background and Procedural Posture

This case arises from a dispute between the Plaintiff/Tenant and Defendant/Landlord regarding a commercial lease ("the Lease") for the Plaintiff to operate a restaurant located at Lilburn Market Center, 4805 Lawrenceville Highway, Suite 104, Lilburn, Georgia 30047 ("the Premises"). The Plaintiff filed its original Complaint on May 5, 2017, filed an Amendment to Complaint on July 26, 2017, and filed a Second Amended Complaint for Damages and Equitable Relief on March 19, 2018 ("Second Amended Complaint"). Plaintiff asserts the following claims in its

Second Amended Complaint, which is currently the operative pleading in this case:

1.Count 1: Constructive Eviction;

2.Count 2: Breach of the Duty to Make Repairs [O.G.G.A. §§ 44-7-13 and 44-7-14, Section 8.01 of the Lease];

3. Count 3: Breach of Contract (One) [Sections 8.01 and of the Lease];

4.Count 4: Breach of Duty of Good Faith and Fair Dealing.

5. Count 5: Breach of Contract (Two) [Section 1.05 of the Lease, O.C.G.A. § 44-7-7];

6. Count 6: Breach of Duty to Give Proper Notice Before Terminating Lease (O.C.G.A. § 44-7-7];

7. Count 7: Breach of Duty of Good Faith and Fair Dealing (Two);

8. Count 8: Breach of Duty to Make a Valid Demand for Possession (O.C.G.A. § 44-7-50];

9. Count 9: Specific Performance;

10. Count 10: Punitive Damages; and

11. Count 11: Litigation Expenses [O.C.G.A. § 13-6-11].

Currently before the Court is the Defendant's Renewed Motion for Summary Judgment filed on March 20, 2018.

Plaintiff filed its responsive pleadings[17] on April 23, 2018. Oral argument on the matter was heard on May 11, 2018, and all parties were represented by their respective counsel at the proceeding. Also pending before the Court are the following motions[18]:

6. Plaintiff's Motions in Limine filed on March 19, 2018;

7. Plaintiff's Motion for Discovery Sanctions filed on March 20, 2018;

8. Plaintiff's Emergency Motion for Order Disregarding Defendant's Renewed Motion for Summary Judgment filed on March 22, 2018;

9. Defendant's Motion for Attorney's Fees filed on April 17, 2018; and

10. Defendant's Motion to Strike Pleadings filed on

---

[17] The Court notes that the Plaintiff's response to the Defendant's Renewed Motion for Summary Judgment is not in the form of a brief and contains no legal argument. Rather, the response essentially consists of a list restating Plaintiff's causes of action and fails to address the legal arguments presented by the Defendant. Nevertheless, the Court has considered the Plaintiff's response, along with Plaintiff's statement of additional material facts, in deciding the Defendant's Renewed Motion for Summary Judgment to the extent that Plaintiff cites to disputed material facts supported by the record in this case.

[18] In addition to the listed motions, Plaintiff also moved the Court to disqualify Defendant's counsel. However, that motion was resolved at the March 21, 2018 pretrial conference in this case by stipulation of the Parties that Defendant would not seek to shift blame to its counsel as an affirmative defense or in apportioning liability as to claims involving the first dispossessory action between the Parties in this case.

April 30, 2018.

Having considered argument of counsel, along with all relevant matters of record in this case, the Court finds as follows.

I. Standard of Review

"To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56 (c)." *Hardin v. Hardin,* 801 S.E.2d 774, 778 (2017) (quoting *Lau's Corp. v. Haskins,* 261 Ga. 491, 491 (405 S.E.2d 474) (1991)). "[O]nce a [moving party] points out that there is an absence of evidence to support the [nonmoving party's] case, the burden then shifts to the [nonmoving party], who 'must point to specific evidence giving rise to a triable issue.'" *Pfeiffer v. Georgia Dep't of Transp.,* 275 Ga. 827, 828-29, 573 S.E.2d 389, 391 (2002) (quoting *Lau's Corp.,* supra). "[A] de novo standard of review [applies] to an appeal from a grant or denial of summary judgment ...." *Ashton Atlanta Residential, LLC v. Ajibola,* 331 Ga. App. 231, 232, 770 S.E.2d 311,312 (2015).

II. Count 1 - Constructive Eviction

Although many of the arguments asserted by the Defendant in support of its Renewed Motion for Summary Judgment are based upon facts in the record that remain disputed, the Court has considered whether each of Plaintiffs claims can survive summary judgment given the nature of the claims in light of the Court's construction of relevant contract terms. Even where there is great conflict between the facts alleged by the Parties,

> "[t]he construction of a contract is a question of law for the court."Contract construction follows three steps: "The trial court must first decide whether the contract language is ambiguous; if it is ambiguous, the trial court must then apply the applicable rules of construction; if after doing so the trial court determines that an ambiguity still remains, the jury must then resolve the ambiguity."[3] Thus, the jury does not become involved in the process, even if the contract is difficult to construe, until there appears an ambiguity in the contract which cannot be resolved by the court's application of the rules of construction set forth in part in O.C.G.A. § 13-2-2.

Parkside Ctr., Ltd. v. Chicagoland Vending, Inc., 250 Ga. App. 607, 616, 552 S.E.2d 557, 565 (2001) (footnotes omitted).

In Count 1 of the Second Amended Complaint, Plaintiff contends that Defendant's alleged failure to timely complete build-out of the Premises caused Plaintiff to be constructively evicted from June 1, 2013 to May 6, 2015, and that Plaintiff is entitled to damages including lost profits and reimbursement of rent. Although Plaintiff seeks to assert constructive eviction as a claim for damages, it is an affirmative defense to the obligation to pay rent rather than an independent cause of action. "Constructive eviction is a specialized defense in rent cases grounded on general principles of contract law respecting failure of consideration, and may involve either total or partial failure of consideration." *Piano & Organ Ctr., Inc. v. Southland Bonded Warehouse, Inc.,* 139 Ga. App. 480,481,228 S.E.2d 615,617 (1976).

Furthermore, Plaintiff agreed to take possession of the Premises "as is" pursuant to Sections 1.02 and 8.01 of the Lease. The fact that Plaintiff cites Defendant's failure to complete build out as the cause for its purported constructive eviction claim shows that the basis of Plaintiffs claim-namely that the Premises had not yet been built out-was a condition that existed at the time the Parties entered into the Lease agreement. A tenant who takes possession of the premises "as is"

> is precluded by the lease from claiming that [it] was constructively evicted by a condition that existed at the time [it] signed the lease. Constructive eviction takes place and a tenant is relieved from paying rent when "the landlord whose duty it is to keep [the premises] in a proper state of repair allows it to deteriorate to such an extent that it is an unfit place for the tenant to carry on the business for which it was rented, and when it cannot be restored to a fit condition by ordinary repairs which can be made without unreasonable interruption of the tenant's business. [Cits.]"

Snipes v. Halpern Enterprises, Inc., 160 Ga. App. 207, 208, 286 S.E.2d 511, 512-13 (1981) (quoting *Overstreet v. Rhodes,* 212 Ga. 521, 523, 93 S.E.2d 715 (1956)). In the instant case, the undisputed fact that Defendant's build out had not yet occurred when the Parties entered into the Lease agreement precludes the possibility that Plaintiff was constructively evicted due to the deterioration of conditions that existed at the time Plaintiff took possession of the Premises.

Because constructive eviction is a defense rather than an independent cause of action, and because the Plaintiff

cannot make the required showing that an existing condition fell into disrepair based on the record in this case even if constructive eviction were available as a cause of action, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 1 of the Second Amended Complaint.

IX. Count 2 - Breach of the Duty to Make Repairs

In Count 2 of its Second Amended Complaint, Plaintiff asserts a claim for Breach of the Duty to Make Repairs. Specifically, Plaintiff contends that:

> [p]ursuant to O.C.G.A. § 44-7-13, Landlord was required to make repairs to the premises in the manner set forth in Section 8.01 of the Lease. Landlord failed to make repairs to the premises in the manner set forth in Section 8.01 of the Lease. Pursuant to O.C.G.A. § 44-7-14, Landlord is liable to Tenant for this failure.[19]

Plaintiff seeks damages pursuant to Count 2 including lost profits.

Although the Plaintiff contends that the Defendant's duty under O.C.G.A. § 44-7-13 was "to make repairs to the premises in the manner set forth in Section 8.01 of the Lease", the statute simply states that a "landlord must keep the premises in repair. He shall be liable for all substantial improvements placed upon the premises by his consent." Plaintiff further relies on O.C.G.A. § 44-7-14, which provides that

> [h]aving fully parted with possession and the

---

[19] Second Amended Complaint, ¶¶ 30-32

> right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.

"A landlord's [tort] liability **to a third person** who is injured on property which was relinquished by rental or under a lease is determined by OCGA § 44-7-14." *Martin v. Johnson-Lemon,* 271 Ga. 120, 123, 516 S.E.2d 66, 68 (1999) (quoting *Colquitt v. Rowland,* 265 Ga. 905, 906, 463 S.E.2d 491 (1995)) (emphasis added). A landlord's duty to repair "does not include a duty of maintenance. Rather, the term 'repair' 'contemplates an existing structure which has become imperfect, and means to supply in the original structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be.'" *Gainey v. Smacky's Investments, Inc.,* 287 Ga. App. 529, 530, 652 S.E.2d 167, 169-70 (2007).

Together, O.C.G.A. § 44-7-13 and § 44-7-14 provide for a landlord's potential liability to persons who are non-parties to a lease agreement. A landlord's duty to repair under these statutes is prospective from the date the tenant takes possession and consists of the duty to restore existing structures to their original condition. In contrast, Section 8.01 of the Lease provides for the following "Landlord's Work":

> The Demised Premises is being delivered to the

> Tenant **"As-1s".** [20] There are no guaranties as to the fitness of purpose or warranty during the term, or any renewal thereof. The Landlord shall do a one-time inspection and service, if required, of the HVAC system, electrical and plumbing system.
>
> The Landlord shall provide the following:
>
> i. Either tile, and or provide for an allowance for tile at the rate of $3 per square foot;
>
> j. Replace and/or provide an allowance of $350 to replace the ceiling tiles;
>
> k. Electrical allowance of $750;
>
> l. Plumbing repairs allowance of $1,000;
>
> m. Provide an allowance of $500 toward the reinstallation of the cooler;
>
> n. Reinstall the hot-water heater (in addition to plumbing repairs);
>
> o. Repair all sheetrock; and
>
> p. Patch the holes in the walls and paint the walls either white or a neutral color.

In examining the Landlord's contractual duties set forth in Section 8.01 of the Lease as cited by the Plaintiff in Count 2 of its Second Amended Complaint, none pertain to the restoration of existing structures to their original condition as of the date the Parties entered into the Lease agreement. Thus, the Section 8.01 duties are purely contractual in nature and the alleged violation of these duties would not independently give rise to a tort claim under O.C.G.A. § 44- 7-13 or § 44-7-14.

In fact, the undisputed terms of the Lease provide that

---

[20] Emphasis in original

the Parties agreed to shift Defendant's duty to repair to the Plaintiff per the express terms of the Lease. Section 1.02 of the Lease provides in pertinent part that

> Tenant acknowledges that it has fully inspected, and accepts, the Demised Premises in its present condition. Tenant warrants, acknowledges and agrees that the Tenant is leasing the Demised Premises in an **"As-ls"**[21] condition and with **"All Faults"**[22]**,** and especially and expressly without warranty, representation and/or guaranty, either express or implied, of any kind, nature or type whatsoever from or on behalf of the Landlord. The Landlord does not make any representations and/or warranty with regards to the compliance with any environmental protection, population or land use laws, rules, regulations, orders or requirements, including those involving asbestos and/or radon. Tenant acknowledges that it had full opportunity to inspect the Demised Premises in this regard, and hereby waives, releases and discharges any claims whatsoever it has, or may have, against the Landlord with respect to the condition of the Demised Premises, either patent or latent.

The Lease further provides in Sections 10.01 and 10.02 that, while the "Landlord shall keep and maintain the exterior walls, roof and structural elements of the Shopping Center, with such also being referred to and defined as 'Common Areas'",

---

[21] Emphasis in original
[22] Emphasis in original

> Tenant shall keep and maintain in good order, condition and repair (including replacement of parts and equipment if necessary) the Demised Premises and every part thereof and any and all appurtenances thereto wherever located, including, but without limitation, the exterior and interior portion of all doors, door checks, windows, plate glass, store front, all plumbing and sewage facilities within the Demised Premises, including free flow up to the main sewer line, fixtures, heating and air conditioning and electrical systems (whether or not located in the Demised Premises), sprinkler systems, fire extinguishers, walls, floors and ceilings. ... Tenant shall repair or replace the units when deemed necessary by Tenant at the Tenant's reasonable discretion.... Tenant to provide Landlord, upon termination of its tenancy, at its sole cost and expense, with certificates from licensed contractors evidencing that the heating, cooling, electrical and plumbing systems are in good repair and operating conditions.[23]

The Court of Appeals has held that "the owner of property not used as a 'dwelling place' - as was the case here - can contract to avoid the duties to repair and improve the property set forth in O.C.G.A. § 44-7-13 and O.C.G.A. § 44-7-14." *Groutas v. McCoy,* 219 Ga. App. 252, 254, 464 S.E.2d 657, 659 (1995) (citing *Gaffney v. EQK Realty Investors,* 213 Ga.App. 653, 445 S.E.2d 771 (1994)); *see also Rainey v. 1600 Peachtree, L.L.C.,* 255 Ga. App. 299, 300, 565 S.E.2d 517, 519 (2002) and *Johnson v. Loy,* 231 Ga. App. 431, 435, 499 S.E.2d 140, 143 (1998) ("O.C.G.A. § 44-7-2(b)(2), which

---

[23] Sections 10.02.A and 10.02.E of the Lease

prohibits landlords from waiving, assigning, transferring, or otherwise avoiding the rights, duties, and remedies provided by O.C.G.A. § 44-7-14, applies only to property to be used 'as a dwelling place.' ... [T]here is no other comparable statute for commercial premises.").

Because the acts or omissions alleged in Count 2 do not constitute "repairs" as contemplated in O.C.G.A. §44-7-13 and§ 44-7-14, and because any such duties to repair under the cited statutes were shifted to the Plaintiff/Tenant by agreement of the Parties, the Plaintiff is essentially seeking tort damages in Count 2 solely for Defendant's alleged violation of its contractual duties under Section 8.01 of the Lease. However,

> [i]t is well settled that mere failure to perform a contract does not constitute a tort. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law. This is true even in situations where the contract is breached in bad faith, where the courts have consistently held that punitive damages are not available because there has been no tort. Here, a App. 53 thorough and careful review of the well- pled factual allegations of (the plaintiff's] complaint and amended complaint, and the written contract itself, shows that all the duties which [the plaintiff] complains were breached by [the defendant] arise directly from, not independent of, ... [the] contract.

ServiceMaster Co., L.P. v. Martin, 252 Ga. App. 751, 754, 556 S.E.2d 517, 521 (2001); *see also Nw. Plaza, LLC (MI) v. Ne. Enterprises, Inc.,* 305 Ga. App. 182, 192, 699 S.E.2d 410,

418 (2010), and Lane v. Corbitt Cypress Co., Inc., 215 Ga. App. 388, 389, 450 S.E.2d 855, 857 (1994) ("'A tort is the unlawful violation of a private legal right other than a mere breach of contract, express or implied.' (Emphasis supplied.) O.C.G.A. § 51-1-1. 'Generally, a mere breach of a valid contract amounting to no more than a failure to perform in accordance with its terms does not constitute a tort or authorize the aggrieved party to elect whether he will proceed ex contractu or ex delicto.'"). For the reasons discussed above, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 2 of Plaintiff's Second Amended Complaint.

X. Count 3 -Breach of Contract (One)

Plaintiff contends in Count 3 of its Second Amended Complaint that the Defendant "breached the Lease by not completing all of the work set forth in Section 8.01 within the time period contemplated in the Lease (or alternatively, within a reasonable time)", "refusing to pay/reimburse for the repairs contemplated in Section 8.01 of the Lease", "refusing to make some or all of the monetary allowances that are set forth in that Section", and "by unreasonably delaying in giving Tenant written approval to make HVAC, mechanical, electrical, and plumbing repairs" per Section 9.02 of the Lease.[24]

> "The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." (Punctuation and footnote omitted.) *Norton v. Budget Rent A Car System,* 307 Ga.App.

[24] Second Amended Complaint, ¶¶ 35-38

> 501, 502, 705 S.E.2d 305 (2010).A breach occurs if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement **as specified in the contract;** or does some act that renders performance impossible. *Bd. of Regents of the Univ. System of Ga. v. Doe,* 278 Ga.App. 878, 887(3), 630 S.E.2d 85 (2006).

UWork.com, Inc. v. Paragon Techs., Inc., 321 Ga. App. 584, 590, 740 S.E.2d 887, 893 (2013) (emphasis added).

Because Plaintiffs cause of action in Count 3 is for breach of contract, Plaintiff must show that Defendant failed to perform a duty "as specified in the contract". *Id.* Accordingly, if the duty alleged to have been breached is not one that is specified in the contract, a cause of action for breach of contract does not lie. In the instant case, Section 8.01[25] of

---

[25] Section 8.01 in its entirety provides as follows:

The Demised Premises is being delivered to the Tenant **"As-Is".** There are no guaranties as to the fitness of purpose or warranty during the term, or any renewal thereof. The Landlord shall do a one-time inspection and service, if required, of the HVAC system, electrical and plumbing system.

The Landlord shall provide the following:

i. Either tile, and or provide for an allowance for tile at the rate of $3 per square foot;

j. Replace and/or provide an allowance of $350 to replace the ceiling tiles;

k. Electrical allowance of $750;

l. Plumbing repairs allowance of $1,000;

m. Provide an allowance of $500 toward the reinstallation of the cooler;

n. Reinstall the hot-water heater (in addition to plumbing repairs);

o. Repair all sheetrock; and

p. Patch the holes in the walls and paint the walls either white or a neutral color.

the Lease does not contain a time period within which the Landlord/Defendant must provide the items listed in subsections (a)-(h). Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to the portion of Count 3 regarding Defendant's alleged lack of timeliness in the performance of its Section 8.01 duties as a breach of contract. Furthermore, Section 9.02[26] of the Lease pertains to the Plaintiffs obligations regarding removal of fixtures and other improvements from the Premises and does not set forth any duties incumbent upon the Defendant. Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to the portion of Count 3 regarding Defendant's alleged obligations to provide written approval for repairs under Section 9.02 of the Lease.

As to the remaining portion of Count 3 alleging that Defendant breached the Lease by refusing to pay, reimburse, or make monetary allowances for repairs as set forth in Section 8.01 of the Lease, the Court finds that there are genuine issues of material fact which preclude summary judgment. Specifically, the Parties' deposition testimony

---

[26] Section 9.02 of the Lease regarding Installation &Removal by Tenant" provides in its entirety as follows:

All alterations, decorations, additions and improvements including lighting fixtures made by Tenant shall be deemed to have attached to the Leasehold and to have become the property of Landlord upon such attachment, and upon expiration of this Lease or any renewal Term thereof, the Tenant shall not remove any of such alterations, decorations, additions and improvements, except trade fixtures installed by Tenant may be removed if all Rent due herein is paid in full and Tenant is not otherwise in default hereunder; provided, however, that Landlord may designate by written notice to Tenant those alterations and additions which shall be removed by Tenant at the expiration or termination of the Lease and Tenant shall promptly remove the same and repair any damage to the Demised Premises caused by such removal.

conflicts as to whether Plaintiff was reimbursed pursuant to subsections (a)-(h) of Section 8.01 of the Lease. Therefore, Defendant's Renewed Motion for Summary Judgment is DENIED as to Breach of Contract claims under Count 3 based upon allegations of failure to pay, reimburse, or make monetary allowances for repairs as provided in Section 8.01 of the Lease.

XI. Count 4 - Breach of Duty of Good Faith and Fair Dealing (One), and Count 7 - Breach of Duty of Good Faith and Fair Dealing (Two)

Plaintiff seeks damages under Counts 4 and 7 for breach of duty of good faith and fair dealing, alleging that Defendant acted in bad faith in breaching the Lease as asserted in Counts 2 and 3, and breaching the duty to provide 60 days notice before terminating the Lease as asserted in Counts 5 and 6.

"Under Georgia law, 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'" *ULQ, LLC v. Meder,* 293 Ga. App. 176, 179, 666 S.E.2d 713, 717 (2008) (quoting *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.,* 281 Ga. App. 450, 451, 636 S.E.2d 139, 141 (2006)). However, the limited set of exceptions to this rule of good faith and fair dealing includes leases such as the contract that is the subject of this case. *See Hunting Aircraft, Inc. v. Peachtree City Airport Auth.,* 281 Ga. App. 450, 454, 636 S.E.2d 139, 142 (2006) (citing leasehold contracts as "an exception to the well-recognized and overarching rule that good faith and fair dealing are implied in all contracts").

Even if the rule of good faith and fair dealing applied to leasehold contracts, Plaintiffs Count 4 and Count 7 would fail once the underlying breach of contract claims were

dismissed. In the instant case, Counts 2, 5 and 6 are dismissed for the reasons discussed in Sections IV, VII and VIII of this Order, and only one portion of Count 3 (regarding reimbursements pursuant to Section 8.01 of the Lease as discussed in Section V of this Order) survives summary judgment. As such, Plaintiffs derivative claims in Count 4 and 7 that are based upon the dismissed underlying counts would fail as a matter of law, even if breach of duty of good faith and fair dealing were an available claim in cases involving leasehold contracts.

> There is no independent cause of action for violation of a duty of good faith and fair dealing in the performance of a contract "apart from breach of an express term of the contract. [Cit.]" *Morrell v. Wellstar Health Sys.,* 280 Ga.App. 1, 5(2), 633 S.E.2d 68 (2006). [Where] the trial court properly dismissed the breach of contract claim... , the claim for breach of duty of good faith and fair dealing under the contract was also properly dismissed since there is no such independent cause of action apart from the breach of contract claim.

Bankston v. RES-GA Twelve, LLC, 334 Ga. App. 302,304, 779 S.E.2d 80, 82 (2015). Therefore,upon the dismissal of the breach of contract claims upon which Plaintiff rests Count 4 and Count 7, Plaintiffs claims based on duty of good faith and fair dealing cannot stand as independent causes of action.

Because leasehold contracts are exceptions to the rule of good faith and fair dealing, and because all but one of the breach of contract claims underpinning Counts 4 and 7 are dismissed, the Defendant's Renewed Motion for Summary

Judgment is GRANTED as to Count 4 and Count 7 of the Second Amended Complaint.

XII. Count 5 - Breach of Contract (Two)

Plaintiff contends in Count 5 that Defendant is liable for breach of contract for violating Lease Section 1.05 and O.C.G.A. § 44-7-7. Although Plaintiff cites to Section 1.05 of the Lease as a basis for his claim for breach of contract, Section 1.05[27] is a holdover clause that sets forth Tenant's duties in the event of a holding over and does not contain any provision for notice prior to the Landlord's termination of the lease. Plaintiff further contends that the Lease requires a 60-day notice period prior to termination of a holdover tenancy because "O.C.G.A. § 44-7-7, which requires landlords to give 60 days' notice before terminating a tenancy at will, is incorporated into this Section of the Lease as a matter of law."[28] As discussed above in Section V of this Order, one of the essential elements of a claim for breach of contract is the non- performance of a duty that is specified in the contract. *See UWork.com, Inc. v. Paragon Techs., Inc.,* 321 Ga. App. 584, 590, 740 S.E.2d 887, 893 (2013). Plaintiff has neither alleged nor directed the Court to any record evidence showing that Defendant breached the specific provisions of Section 1.05 of the Lease, which is the

---

[27]Section 1.05 of the lease provides in its entirety as follows:
It is hereby agreed that in the event of Tenant holding over after the termination of this Lease, without dispute, thereafter the tenancy shall be from month to month in the absence of a written agreement to the contrary, and Tenant shall pay to Landlord an occupancy charge equal to One Hundred Twenty-Five Percent (125%) of the Base Rent, plus all other charges payable by Tenant under this Lease, for each month from the expiration or termination of this Lease until the date the Demised Premises are delivered to Landlord in the condition required herein, and Landlord's right to damages for such illegal occupancy shall survive.

[28] Second Amended Complaint, p. 6. ¶ 45.

only Lease provision cited in Count 5 for breach of contract. Accordingly, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 5 of the Second Amended Complaint.

XIII. Count 6 - Breach of Duty to Give Proper Notice Before Terminating Lease, and Count 8 - Breach of Duty to Make a Valid Demand for Possession

Count 6 and Count 8 seek damages for the Defendant's alleged failure to provide statutory notice prior to terminating the Lease and alleged failure to make statutory pre-litigation demand. However, a landlord's failure to give at least 60 days notice prior to terminating a tenancy at will and failure to make demand are defenses to dispossessory actions rather than standalone causes of action for which a tenant may seek damages. "Tenants at will are entitled to 60 days' notice of termination under O.C.G.A. § 44-7-7, and a demand for possession following the expiration of this time period is a condition precedent to the institution of dispossessory proceedings under O.C.G.A. § 44-7-50(a)." *Drury v. Sec. State Bank,* 328 Ga. App. 39, 41, 759 S.E.2d 635, 638 (2014) (citing *Trumpet v. Brown,* 215 Ga.App. 299, 300(2), 450 S.E.2d 316 (1994)). The Plaintiff in this case has not cited any authority supporting its assertion of the 60-day notice or demand requirements as separate causes of action, and the Court is not aware of any such authority. Because the statutes requiring landlords to provide 60 days notice before terminating an at-will tenancy and to make demand before filing a dispossessory do not provide a cause of action outside the context of defending a dispossessory action, the Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 6 and Count 8 of the Second Amended Complaint.

XIII. Count 9 - Specific Performance

In Count 9, the Plaintiff contends it should be allowed an additional three year term under the current Lease terms in light of the Defendant's alleged delay in the performance of its contractual duties.[29] Specific performance is an available equitable remedy in cases involving lease of real property.

> The object of equity is to place the parties in the same position they would have occupied had a breach not occurred. *Golden v. Frazier,* 244 Ga. 685, 261 S.E.2d 703 (1979). Contracts for the lease of properties are enforceable by specific performance just as contracts for the sale of property. *F. & W Grand Five-Ten-Twenty-Five Cent Stores, Inc. v. Eiseman,* 160 Ga. 321, 127 S.E. 872 (1925).

Peachtree On Peachtree Jnv'rs, Ltd. v. Reed Drug Co., 251 Ga. 692, 696, 308 S.E.2d 825, 829 (1983). However, "equity will be denied if there is a remedy at law for damages". *Liniado v. Alexander,* 199 Ga. App. 256, 258, 404 S.E.2d 602, 604 (1991) (noting the exception for contracts for the *sale* of real property). The Georgia Supreme Court further held in *Peachtree, supra,* that even where a commercial lease was wrongfully terminated by the landlord, the tenant was not entitled to specific performance of the remaining lease term (i.e. right to occupy the premises beyond the lease termination date for a period equal to the time that remained at the point of wrongful termination) because an award of money damages for the landlord's violation of lease provisions constituted an adequate remedy at law.

---

[29] Second Amended Complaint, ¶ 77.

In the instant case, Plaintiff seeks monetary damages for Defendant's alleged breaches of its contractual duties in addition to specific performance under the original Lease terms. The Court notes that, during the pendency of this case and related litigation, Plaintiff has already occupied and operated its business at the Premises beyond the termination date specified in the Lease (i.e. June 30, 2016) in excess of the disputed 22-month period of Plaintiffs alleged inability to operate its business due to Defendant's delay.[30] However, the Plaintiff would not have been entitled to equitable relief through specific performance in any event because monetary damages, if any, pursuant to its breach of contract claim would provide Plaintiff with an adequate remedy at law and preclude the award of specific performance. Accordingly, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 9 of the Second Amended Complaint.

XIV. Count 10 - Punitive Damages

Plaintiff seeks punitive damages in Count 10 of its Second Amended Complaint. However, "[p]unitive damages are not available in breach of contract claims." *Roberts v. JP Morgan Chase Bank, Nat'! Ass'n,* 342 Ga. App. 73, 79, 802 S.E.2d 880, 886 (2017) (quoting *ServiceMaster Co. v. Martin,* 252 Ga. App. 751, 757 (2) (c), 556 S.E.2d 517 (2001) and noting that "'[f]raud, if found, is tortious conduct' and will justify punitive damages."). "[E]ven in situations where the contract is breached in bad faith, . .. courts have consistently held that punitive damages are not available [where] there has been no tort." *ServiceMaster Co., L.P. v. Martin,* 252 Ga. App. 751, 754, 556 S.E.2d 517,521 (2001).

In the instant case, the only cause of action remaining after

---

[30] *See* Second Amended Complaint, ¶73.

the Court's ruling on the Defendant's Renewed Motion for Summary Judgment is a portion of Count 3 for breach of contract. Because Plaintiff is proceeding with a single count for breach of contract and has no surviving tort claims upon which to base an award of punitive damages, the Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count 10 of the Second Amended Complaint.

XV. Count 11 - Litigation Expenses

In Count 11, Plaintiff seeks to recover the expenses of litigation from the Defendant. However, "[a] recovery of O.C.G.A. § 13-6-11 attorney's fees in a contract action must be based upon evidence which shows more than a mere breach of contract." *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.,* 230 Ga. App. 455, 457, 496 S.E.2d 546, 550 (1998) (quoting *Williams Tile & Marble Co., Inc. v. Ra-Lin & Associates, Inc.,* 206 Ga. App. 750, 752- 753, 426 S.E.2d 598 (1992)). The Court of Appeals further held in *Pulte* that, where there was no evidence of bad faith by the party alleged to have breached a contract, "the trial court erred in denying [that party's] motion for directed verdict as to its non-liability for O.C.G.A. § 13-6-11 attorney fees." *Pulte, supra,* at 457. The Plaintiff in this case has presented no competent record evidence showing that Defendant's actions or inactions pursuant to the Lease terms were anything more than alleged breaches of contract or that they involved bad faith. Therefore, Defendant's Renewed Motion for Summary Judgment is GRANTED as to Count **11** of the Second Amended Complaint.

XVI. Conclusion

For the reasons discussed above, the Defendant's Renewed Motion for Summary Judgment is hereby DENIED as to that portion of Plaintiffs Count 3 breach of the contract

claim regarding failure to pay, reimburse, or make monetary allowances for repairs as provided in Section 8.01 of the Lease. The Defendant's Renewed Motion for Summary Judgment is further GRANTED as to all remaining Counts, including those portions of Count 3 not described in the preceding sentence of this Order.

The Court further DENIES the Plaintiffs Motions in Limine as moot without prejudice to Plaintiff renewing any motions that apply to the remaining claim in this case at the appropriate time. Plaintiffs Motion for Discovery Sanctions, Plaintiffs Emergency Motion for Order Disregarding Defendant's Renewed Motion for Summary Judgment, Defendant's Motion for Attorney's Fees, and Defendant's Motion to Strike Pleadings are also DENIED. To the extent that the Plaintiff seeks to pursue its motion to disqualify Defendant's counsel which appears to have been previously resolved by agreement of counsel, that motion is also DENIED.

SO ORDERED this the 10th day of September, 2018.

s/ Keith Miles
Hon. Keith Miles
Judge, Superior Court of Gwinnett County
By Designation

cc: All parties and counsel of record

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

1) SMOKEMASTERS RIBS'N POLLO INCORPORATED, Plaintiff, v. 1) LILBURN CENTER, LLC, Defendant.	CIV. ACTION NO. 17-A-04489-9

THIRD AMENDED COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

COMES NOW Plaintiff SMOKEMASTERS RIBS'N POLLO INCORPORATED ("Smokemasters," "Plaintiff," or "Tenant") by and through the undersigned counsel, and files this Second Amended Complaint for Damages and Equitable Relief, further showing this Honorable Court the following:

PARTIES, JURISDICTION, AND VENUE

1. This Action relates to a dispute concerning a lease agreement (hereinafter, "Lease") on a commercial property in Gwinnett County, Georgia. As such, jurisdiction and venue are proper in this Court.

2. Plaintiff Smokemasters is a Georgia corporation.

4. Defendant Lilburn Center, LLC ("Lilburn Center" or "Landlord") is a Georgia limited liability company. Service

on Lilburn Center may be perfected on its registered agent, Royal Capital Management, LLC.

FACTS

5. Tenant entered into the Lease with Landlord on February 14, 2013. See (Lease at p. 1) (attached as Exhibit "A" to the original Verified Complaint and incorporated herein by reference). The address of the demised premises is 4805 Lawrenceville Hwy., Suite 104, Lilburn, GA 30047 (the "Property").

6. The Lease states that the Property would be used as a "ribs and chicken restaurant." Id. at p. i; id. at § 4.01.

7. The Lease term expired on June 30, 2016, after which time the tenancy became a "month-to-month" tenancy at will. Id. at §§ 1.03, 1.05.

8. Pursuant to the Lease, Landlord was responsible for completing the items set forth in Section 8.01 within the proscribed "build-out" period. Id. at p. ii,§ VI; p. 12, § 8.01.

9. Pursuant to the Lease, the build-out was supposed to start on February 14, 2013 and was supposed to be completed on March 31, 2013. Id.

10. Section 8.01 of the Lease required Landlord to perform a one-time inspection of the HVAC system, the electrical system, and the plumbing system, and to perform a one-time service of said systems "if required." Id. at p. 11, § 8.01.

11. Section 8.01 of the Lease also required the Landlord to, inter alia, “either tile and or provide an allowance for tile at the rate of $3 per square foot," "re-install the hot water heater (in addition to plumbing repairs)," to "repair all sheetrock," and to "patch the holes in the walls and paint the walls either white or a neutral color." Id. at p. 12, § 8.01.

12. Landlord did not complete all of the work set forth in Section 8.01 within the time period contemplated in the Lease (i.e., by March 31, 2013).

13. Tenant was forced to pay Landlord's contractor to continue the build-out work set forth in Section 8.01 because Landlord refused to continue paying the contractor.

14. In several communications sent in 2013, Tenant detailed the things related to the build-out that Landlord was required to do under the Lease and had not yet done.

15. Landlord responded by asserting that everything had been done and demanded that Tenant begin making rent payments by January 1, 2014, or the Tenant would be defaulted.

16. Tenant began making rent payments to avoid being defaulted, even though the Property was unusable for the purpose contemplated in the Lease.

17. At the time Landlord indicated it wasn't going to do any more work on the Property (in late December of 2013), Landlord had not "inspected" the HVAC, electrical, and plumbing per Section 8.01 of the Lease in the manner required by State, County, and/or local laws, rules, regulations and ordinances.

18. There were serious problems with the HVAC, electrical, and plumbing. These would have been identified

had an "inspection" been performed and would have been resolved had a "service" been performed.

19. Some of these problems, if not resolved, would have prevented tenant from obtaining a certificate of occupancy from the Gwinnett County Fire Department ("Fire Dept."), an operating permit from the Gwinnett County Environmental Health Section ("Health Dept."), and/or a certificate of occupancy from the City of Lilburn ("the City"). Thus, pursuant to Section 8.01 of the Lease, Landlord was "required" to fix these problems ("service"), but the Landlord failed and refused, so Tenant was forced to fix these problems at its own expense.

20. Some of these problems did, in fact, prevent tenant from obtaining a certificate of occupancy from the Gwinnett County Fire Department ("Fire Dept."), an operating permit from the Gwinnett County Environmental Health Section ("Health Dept."), and/or a certificate of occupancy from the City of Lilburn ("the City"). Tenant was forced to fix these problems at its own expense in order to obtain the required certificates of occupancy and permits.

21. Landlord refused to finance any of these repairs or reimburse Tenant for the repairs.

22. Landlord also refused to pay for other items contemplated in Section 8.01 of the Lease, which Tenant had to pay for it at its own expense.

23. Section 8.01 of the Lease also required Landlord to pay certain allowances to Tenant related to servicing and repair, which Landlord failed and refused to do.

24. Tenant did not obtain an operating permit from the Health Dept. (which was the final permit required before

Tenant could commence operating) until April 20, 2015. Percy Square (Tenant's owner/operator) was informed that Tenant had been permitted on or about May 9, 2015 via a letter from the Health Dept. dated May 6, 2015. Tenant began operating immediately upon receipt of said letter.

25. Tenant had paid rent for 16 months (January 2014-April 2015, inclusive) prior to commencing operations.

26. Landlord sent tenant a notice to quit dated February 21, 2017. That notice stated that Landlord was terminating the Lease as of April 30, 2017.

27. Landlord filed an eviction action against Tenant on March 28, 2017 and swore under oath in the dispossessory warrant that "tenant holds the premises over and beyond the term for which they were rented or leased to tenant."

28. Landlord filed a second eviction action against Tenant on May 1, 2017. Landlord obtained a judgment in that action on May 17, 2017.

29. Tenant operated its business as a tenant for years for fourteen (14) months (May 2015-June 2016, inclusive).

30. Tenant operated its business as a tenant at will for ten (10) months (July 2016-April 2017, inclusive).

31. As of the filing of this Third Amended Complaint, Tenant has operated its business as a tenant at sufferance for twelve (12) months (May 2017-April 2018, inclusive).

COUNT 1: CONSTRUCTIVE EVICTION

32. Tenant incorporates the foregoing Paragraphs 1-31 as if fully set forth and restated herein.

33. Under the Lease, the Landlord's portion of the build-out was to be completed by March 31, 2013, and the Tenant was scheduled to commence operations on June 1, 2013.

34. Due (in full or in part) to Landlord's acts and omissions, Tenant was not able to obtain permission to operate from the Health Dept. until April 20, 2015, and Tenant didn't commence operating until May 9, 2015.

35. Due (in full or in part) to Landlord's acts and omissions, Tenant was constructively evicted from the Property from June 1, 2013 (inclusive) until on or about May 9, 2015.

36. Tenant is entitled to all damages recoverable as a direct and proximate result of this constructive eviction, including (without limitation) damages for lost profits (for the duration of the constructive eviction caused by the Landlord), as well as reimbursement of the rent that Tenant paid to Landlord during the period of the constructive eviction (to the extent caused by the Landlord).

COUNT 2: BREACH OF THE DUTY TO MAKE REPAIRS

37. Tenant incorporates the foregoing Paragraphs 1-36 as if fully set forth and restated herein.

38. Pursuant to O.C.G.A. § 44-7-13, Landlord was required to make repairs to the premises in the manner set forth in Sections 8.01 and 10.01 of the Lease.

39. Landlord failed to make certain repairs to the premises (as required by Sections 8.01 or 10.01 of the Lease) in a timely manner (or at all).

40. Pursuant to O.C.G.A. § 44-7-14, Landlord is liable in tort to Tenant for this failure.

41. Tenant is entitled to all damages recoverable as a direct and proximate result of this failure, including (without limitation) damages for lost profits.

COUNT 3: BREACH OF CONTRACT (ONE)

42. Tenant incorporates the foregoing Paragraphs 1-41 as if fully set forth and restated herein.

43. Landlord breached the Lease by not completing some of the work contemplated in Sections 8.01 or 10.01 in a timely manner (or at all).

44. Landlord also breached the Lease by refusing to pay/reimburse Plaintiff for the work contemplated in Section 8.01 of the Lease that Plaintiff performed.

45. Landlord also breached Section 8.01 of the Lease by refusing to make some or all of the monetary allowances that are set forth in that Section.

46. Landlord also breached Section 9.02 of the Lease by unreasonably delaying in giving Tenant written approval to make HVAC, mechanical, electrical, and plumbing repairs.

47. Tenant is entitled to all damages (nominal or otherwise) recoverable as a direct and proximate result of these breaches of contract, including (without limitation) damages for lost profits and reimbursement of repair expenses.

COUNT 4: BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING (ONE)

48. Tenant incorporates the foregoing Paragraphs 1-47

as if fully set forth and restated herein.

49. Landlord's breach of the duty to make repairs set forth in Count 2, *supra,* and its breaches of contract set forth in Count 3, *supra,* were done in bad faith.

50. Tenant is entitled to all damages recoverable as a direct and proximate result of Landlord's bad faith.

COUNT 5: BREACH OF CONTRACT (TWO)

51. Tenant incorporates the foregoing Paragraphs 1-50 as if fully set forth and restated herein.

52. Section 1.05 of the Lease provides that Tenant became an "at-will" Tenant after June 30, 2016.

53. O.C.G.A. § 44-7-7, which requires landlords to give 60 days' notice before terminating a tenancy at will, is incorporated into this Section of the Lease as a matter of law.

54. Thus, the Lease could not be terminated under O.C.G.A. § 44-7-7 until at least 60 days after the 60-day "notice to quit" had been given to the Tenant. This is an implied term of the Lease.

55. Landlord sent a notice to quit to tenant on February 21, 2017, stating that the Lease would expire at 5:00 p.m. on April 30, 2017. (Thus, Tenant could not have "held over and beyond the term" until 5:01 p.m. on April 30, 2017.) However, Landlord effectively terminated the Lease on March 28, 2017 by filing a dispossessory action against Tenant on that day. This act constituted a breach of the Lease.

56. Tenant is entitled to all damages (nominal or

otherwise) recoverable as a direct and proximate result of these breaches of contract, including (without limitation) damages for lost profits, attorneys' fees and costs, etc.

COUNT 6: BREACH OF DUTY TO WAIT FOR EXPIRATION OF NOTICE PERIOD BEFORE TERMINATING LEASE/ATTEMPTED MALICIOUS EVICTION

57. Tenant incorporates the foregoing Paragraphs 1-56 as if fully set forth and restated herein.

58. O.C.G.A. § 44-7-7 requires landlords to give 60 days' notice before terminating a tenancy at will. That statute necessarily requires a landlord to wait for the 60 days to actually expire before terminating the tenancy under O.C.G.A. § 44-7-7. Otherwise, the statue would be reduced to a truism.

59. Landlord sent a notice to quit to tenant on February 21, 2017, stating that the Lease would expire at 5:00 p.m. on April 30, 2017.

60. Landlord terminated the Lease on March 28, 2017 by filing a dispossessory action (Case No. 17-M-09656) against Tenant on that day.

51. Landlord had actual knowledge of the fact that Tenant was a tenant at will and that Tenant's tenancy at will had not expired at the time that Case No. l 7-M-09656 was brought.

52. Landlord had no legal right to file and prosecute the dispossessory action docketed as Case No. 17-M-09656, and did so with malicious, willful, and/or reckless disregard for

Tenant's rights in the Property, and/or with an intent to injure Tenant.

53. Tenant has incurred legal expenses and costs as a direct and proximate result of Landlord's unlawful filing of that dispossessory action.

54. Tenant has also incurred lost profits as a direct and proximate result of Landlord's unlawful filing of that dispossessory action.

55. In additional to the damages set forth above, Tenant is entitled to any other damages recoverable as a direct and proximate result of Landlord's filing of that dispossessory action.

COUNT 7: BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING (TWO)

56. Tenant incorporates the foregoing Paragraphs 1-55 as if fully set forth and restated herein.

57. Landlord's breach of contract set forth in Count 5, *supra,* and its breach of legal duty set forth in Count 6, *supra,* were done in bad faith.

58. Tenant is entitled to all damages recoverable as a

direct and proximate result of Landlord's bad faith.

COUNT 8: SPECIFIC PERFORMANCE

59. Plaintiff incorporates by reference the foregoing paragraphs 1-58 as if fully set forth and restated herein.

60. Tenant entered into the Lease with the full expectation that Tenant would be able to occupy the Property for three consecutive years **as a tenant for years.** See (Ver. Compl. at **Ex."A",** p. ii, § VI).

61. This would allow Tenant to operate, grow, and expand for three consecutive years free from the threat of being subjected to a 60-day notice to quit at a moment's notice.

62. Tenant's owner/operator (Mr. Percy Square) anticipated that it would take two years for the business to gain notoriety and that franchising would begin in the third year. Mr. Square intended to use the Property as a training location for franchisees in the third year. Finally, Mr. Square anticipated that he would be able to either sign a new lease with Landlord for the Property or take steps to move into a new location in the final three months of the Lease.

63. Tenant entered into its third year of occupancy in May of 2017. As anticipated, it had begun to garner interest from potential franchisees. (In a website posting made on February 20, 2018, the website thisisinsider.com (which is owned by Insider, Inc.-the same company that runs the other "Insider" websites/publications such as Market Insider, Business Insider, Tech Insider, etc.) had Plaintiff ranked as the No. 32 barbecue restaurant in the U.S.[31] Likewise, in a blog post dated May 1, 2018, the blog "It's a Southern Thing" had Plaintiff ranked as the #1 barbecue restaurant in the State of Georgia based on data from Yelp.[32])

---

[31] http://www.thisisinsider.com/best-barbecue-usa-2017-5

[32] http://www.southernthing.com/most-popular-bbq-restaurants-2565037717.html

64. However, Landlord sought to terminate the Lease as of April 30, 2017 at 5:00 pm, and actively sought to evict Tenant from the Property as of March 28, 2017. This has completely thwarted Tenant's ability to follow through with franchising efforts.

65. Tenant is current on rent as of the date of filing of this Third Amended Complaint.

66. Due (in full or in part) to Defendant's breaches of contract, constructive eviction, and breach of the duty to make repairs, Tenant did not obtain permission to operate from the Health Dept. until April 20, 2015 and wasn't notified of such until after May 9, 2015 - approximately 22 months later than Tenant's anticipated opening date.

67. Tenant would have to completely shut down its business in order to locate, acquire, build out, and obtain occupancy permits for a new facility (which will be especially difficult and costly now that Tenant has two eviction proceedings on its credit history, and given that Mr. Square will soon be 66 years old and is in need of a double hip replacement). This would result in lost revenue and (potentially) a loss in customers from which the business might never be able to recover. It would also cause a tremendous loss in confidence on the part of prospective franchisees, and Tenant likely would not be able to regain that confidence for several years. For these reasons and others, there is a very high likelihood that Tenant will suffer irreparable harm if the Lease is not extended as an equitable remedy.

68. Tenant is entitled to specific performance of the Lease term as an equitable remedy. In other words, Tenant

is entitled to the full benefit of its bargain: (a) occupancy and use of the Property, (b) for the purpose contemplated in the Lease, (c) for three consecutive years, (d) **as a tenant for years.** See Peachtree on Peachtree Investors, Ltd. v. Reed Drug Co., 251 Ga. 692, 696- 697 (1983).

69. This time would **begin** running from the time that the Court entered an order and judgment decreeing that Tenant is entitled to specific performance of the Lease. See Peachtree on Peachtree Investors, Ltd. v. Reed Drug Co., 251 Ga. 692, 696-697 (1983).

70. Tenant respectfully requests that the Court require Defendant to specifically perform under the Lease by extending the Lease term by three years from the date of the entry of the Court's decree.

COUNT 9: PUNITIVE DAMAGES

71. Tenant incorporates by reference the foregoing paragraphs 1-70 as if fully set forth and restated herein.

72. To the extent Tenant can establish at trial by clear and convincing evidence that some or all of the acts and omissions of Landlord or its agents were done willfully, maliciously, recklessly, without regard to consequences, and/or with intent to cause harm, Tenant would be entitled to an award of punitive damages.

COUNT 10: LITIGATION EXPENSES

73. Tenant incorporates the foregoing Paragraphs 1-73 as if fully set forth herein.

74. To the extent Tenant can show at trial that some or all of Landlord's acts were done in bad faith, demonstrate

stubborn litigiousness, and/or have caused Tenant unnecessary trouble and expense, Tenant may be entitled to recover its reasonable attorney fees and litigation expenses from Landlord pursuant to OCGA 13-6-11.

DEMAND FOR JURY TRIAL

75. Tenant incorporates the foregoing Paragraphs 1-75 as if fully set forth herein.

76. Tenant demands a trial by jury as to all claims so triable.

WHEREFORE, Plaintiff prays for relief as follows:

(1) For a trial by jury as to all claims so triable;

(2) For judgment in favor of Plaintiff for all damages sustained in an amount to be proven at trial;

(3) For prejudgment interest;

(4) For a judgment requiring Defendant to specifically perform the Lease;

(6) For an award of attorney's fees and costs; and

(7) For such other and further relief as this Court deems just and proper.

This 10th day of May 2018.

s/ William J. Smith
William J. Smith
Georgia Bar No. 710280
ATTORNEY FOR PLAINTIFF

SMITH LAW, LLC
3611 Braselton Highway
Dacula, GA 30019
Direct: 678-889-2264
Office: 678-690-5299
william@smithlaw.llc.com

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of May, 2018, caused service of the foregoing to issue on the adverse parties as required by law.

s/ William J. Smith
William J. Smith
Georgia Bar No. 710280
ATTORNEY FOR PLAINTIFF

SMITH LAW, LLC
3611 Braselton Highway
Suite 202
Dacula, GA 30019
Direct: 678-889-2264
Office: 678-690-5299
william@smithlaw.llc.com