

FORMS OF TITLE LITIGATION

Real Property Law Section
Title Standards CLE
David S. Klein, Esq.



ROUNTREE
LEITMAN KLEIN & GEER
LLC

Introduction to Presenter

- Partner with Rountree Leitman Klein & Geer, LLC
- 12 attorneys and office is located in Brookhaven, Georgia
- Real estate litigation, bankruptcy, bankruptcy litigation, collections, foreclosures, evictions
- Residential and commercial real estate litigation, quiet title actions, foreclosures, evictions, and served as special master in Fulton County Superior Court
- Served on the RPLS Executive Committee from 2016 - 2022



What forms of title litigation are there?

- There are a number of different types of title litigation, some of which will be discussed:
 - Quiet Title Actions
 - *Conventional and Statutory*
 - Declaratory Judgment Actions
 - Reformation Actions
 - Equitable Subrogation Actions
 - Partition Actions
 - *Statutory, Equitable, and Heirs Property Act*
 - Fraudulent Transfer Actions
 - Bankruptcy Avoidance Actions
 - General Equitable Actions

What forum may the actions be brought in?

- Title litigation is generally equitable in nature
- Usually filed in Superior Court
 - *Superior Courts have equitable jurisdiction (Ga. Const. and O.C.G.A. § 23-1-1)*
- State-Wide Business Court has concurrent equitable jurisdiction although it is more limited than Superior Courts (O.C.G.A. § 15-5A-3)
 - *Commercial real property is covered under O.C.G.A. § 15-5A-3(a)(1)(A)(xvii)*
 - *Damages must be in excess of \$1 million for commercial real property*
- Federal Courts may have concurrent equitable jurisdiction
 - *Must have diversity (parties of different states and \$75,000 amount in controversy) or federal question jurisdiction (federal statute)*
 - *Declaratory Judgment Act (U.S.C. § 2201) does not provide an independent source of federal jurisdiction*

What venue may the actions be brought in?

- For state court actions, generally where the defendant resides or is located (Ga. Const. Art. VI, § 2, ¶ VI)
- For federal actions, generally the district and division where the defendant resides or is located or where a substantial part of the events occurred or a substantial part of property is located (28 U.S.C. § 1391(b))
- Statutory quiet title actions should be brought in the Superior Court of the county where the real property is situated because it is a proceeding *in rem* (O.C.G.A. § 23-3-62)
- Long arm statute allows out of state parties to be subjected to the jurisdiction of Georgia courts if they “own, use, or possess any real property situated in the state” (O.C.G.A. § 9-10-91(4))

Quiet Title Actions

- Conventional (or Equitable) Quiet Title Action
 - O.C.G.A. § 23-3-40 et seq
 - *This quiet title statute is used for the limited purpose of clearing clouds on title*
 - Cancelling certain instruments (e.g., forged deeds, reverted security deeds, etc.)
 - Resolving boundary line, encroachment, and trespass issues with a known person
 - Equities of redemption following tax sales (O.C.G.A. § 23-3-44)
 - No special master is required, but one may be requested (O.C.G.A. § 23-3-43)
 - No right to a jury trial, since this is an equitable proceeding (O.C.G.A. § 23-3-43)
 - Must be filed in the county of residence of a defendant (Ga. Const. Art. VI, § 2, ¶ 3; *Republic Title Co v. Andrews*, 347 Ga. App. 463 (2018))

Quiet Title Actions

- Statutory Quiet Title Action
 - O.C.G.A. § 23-3-60 *et seq*
 - *This quiet title statute is used for broader purposes*
 - This is an *in rem* proceeding and is against identifiable persons and also unknown persons that may claim an interest in the land
 - Resolving title issues with unknown claimants and issues with the ownership of the entire tract of land itself
 - Specific requirements for the petition (O.C.G.A. § 23-3-62)
 - Special master is required (O.C.G.A. § 23-3-63)
 - Any party may demand a jury trial (O.C.G.A. § 23-3-66)
 - Since it is an *in rem* proceeding, must be filed in the county where the land is situated
 - Most title insurance companies will require a statutory quiet title action to insure title

Declaratory Judgment Actions

- Declaratory Judgment Actions
 - O.C.G.A. § 9-4-2 (*in Georgia State Courts*)
 - Venue limited to Superior Courts and the State-Wide Business Court
 - Court has the ability to adjudicate "rights and other legal relations of any interested party"
 - Still available even if there are other remedies at law or equity
 - *FRCP 57 and 28 U.S.C. § 2201 (in Federal Courts)*
 - Similar standards to the Georgia statute
 - Must have diversity or federal question jurisdiction on a main claim

Declaratory Judgment Actions

- Declaratory Judgment Actions
 - *Purposes are usually limited or in the alternative*
 - May be used to determine language in a decree or a deed. *Royal v. Royal*, 246 Ga. 229 (1980)
 - May be used in specific performance actions. *Smyrna Dev. Co. v. Whitener Ltd. P'ship*, 280 Ga. App. 788 (2006) and *Del Lago Ventures, Inc. v. QuikTrip Corp.*, 330 Ga. App. 138 (2014)
 - May be used in conflicts regarding entry of a party onto land. *Smith v. Jones*, 278 Ga. 661 (2004)
 - *Practice Tip:*
 - Best practice is to assert a Declaratory Judgment claim as an alternative claim in any quiet title or other equitable proceeding, since the Court has broad discretion to determine the rights of parties

Reformation Actions

- Reformation Actions
 - O.C.G.A. § 23-2-20 *et seq*
 - This is an equitable proceeding and must be brought in Superior Court or Federal Court
 - Used when a scrivener's affidavit or corrective instrument is unavailable
 - *Purposes:*
 - Correcting a legal description
 - Correcting a grantor or grantee name
 - Adding documents that are missing from a recorded instrument
 - *Practice Tip:*
 - It may be helpful to assert this claim in addition to a quiet title claim or a declaratory judgment claim so the Court has broader discretion to determine the rights of the parties

Reformation Actions

- Reformation Actions

- *Standards for Reforming an Instrument*
 - Mistake should not be anticipated by the parties at the time of contracting and there should be present "an undue advantage to one of them over another in a court of law" (O.C.G.A. § 23-2-20)
 - Mistake must be an "unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence" (O.C.G.A. § 23-2-21(a))
 - Must be exercised with caution (O.C.G.A. § 23-2-21(c))
- *Reformation requires that the mistake be mutual (O.C.G.A. § 23-2-30; 23-2-21)*
 - Relief may be granted even if the complainant has been negligent as long as the other party has not been prejudiced (O.C.G.A. § 23-2-32(b))
- *Rescission may be based on a unilateral mistake (O.C.G.A. § 23-2-31)*
- *The relief may be against the original parties or their privies (O.C.G.A. § 23-2-34)*

Equitable Subrogation Actions

- Equitable Subrogation Actions

- *Definition:*

- “[I]n certain circumstances, a lender who pays off the lien of a senior creditor may step into the shoes of the senior creditor as to the priority of the senior creditor’s lien.” *Greer v. Provident Bank*, 282 Ga. App. 566, 568 (2006)
 - “Where one advances money to pay off an encumbrance on realty either at the instance of the owner of the property or the holder of the encumbrance, either upon the express understanding or under circumstances under which an understanding will be implied that the advance made is to be secured by the senior lien on the property, in the event the new security is for any reason not a first lien on the property, the holder of the security, if not chargeable with culpable or inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equity of others would be prejudiced thereby.” *Davis v. Johnson*, 241 Ga. 43, 438 (1978)

Equitable Subrogation Actions

- Equitable Subrogation Actions

- *Real World Scenario:*

- Lender A has a security deed on the property. Lender B is engaged by the borrower to refinance the property to pay off Lender A. Lender B pays off Lender A's loan on the property. Lender A's security deed is cancelled of record. Lender B's security deed is never recorded due to an excusable error with its closing attorney's office. Lender C is engaged by the borrower for a loan whereby the borrower receives \$100,000. Lender C's security deed is recorded against the property. Lender C's loan is not repaid and begins non-judicial foreclosure proceedings. Lender B discovers that its security deed was never recorded. Lender B files a petition against the borrower and Lender C, and asserts a claim for equitable subrogation.

Equitable Subrogation Actions

- Equitable Subrogation Actions

- *Typical Remedy:*

- “[E]quity will set aside a cancellation of the original security and revive it ‘for the benefit of the party who paid it off.’ *Davis*, 241 Ga. at 438.
 - Remedy may be denied if:
 - *The claimant is guilty of culpable or inexcusable neglect (e.g., waited too long or failed to add someone to the loan transaction even though they had an interest in the property)*
 - *If the superior or equal equity of others would be prejudiced (e.g., the intervening lienholder believed it would be in senior status)*
 - *If the exercise of the right of subrogation will in a substantial way prejudice the intervening lienholder’s rights*
 - Very fact specific to the case



Partition Actions

- Typically used when joint owners cannot agree on disposition of the property
- Statutory Partition Action (O.C.G.A. § 44-6-160)
 - *Requirements:*
 - This is the “default” partition action
 - Property cannot be held as joint tenants, must be severed before
 - Must provide 20 days notice to the other party (O.C.G.A. § 44-6-162)
 - *Procedure:*
 - Filed in county where property situated
 - Appointment of five (5) partitioners (O.C.G.A. § 44-6-163)
 - Physical division of the property or sale of the property if it cannot be divided
 - If property must be sold, appraisers appointed (O.C.G.A. § 44-6-166.1(c))
 - Various other procedural requirements must be followed

Partition Actions

- Equitable Partition Action

- *Requirements:*

- Can only be used when “the remedy at law is insufficient or peculiar circumstances render the proceeding in equity more suitable and just”
 - The “peculiar circumstances” may include:
 - *A need to adjust the accounts of cotenants*
 - *A need to adjust the claims of the cotenants*
 - *The complexity of interests held by both resident and nonresident cotenants*
 - *Coker Properties v. Brooks, 278 Ga. 638 (2004) and Chaney v. Upchurch, 278 Ga. 515 (2004)*

Partition Actions

- Equitable Partition Action

- *Procedure:*

- This is an equitable so if this claim stands alone must be filed in the county where the defendant resides, but if a statutory partition action is made as the main claim and this as the alternative claim, can be filed in the county where the land is located
 - If accepted, allows the Court broad discretion to determine whether to divide the land or force a sale of the land

- *Practice Tip:*

- Always plead equitable partition along with a statutory partition claim, or vice versa
 - If you can get the Court to proceed on an equitable partition claim, much easier as you do not have to follow the statutory partition archaic procedures

Partition Actions

- Heirs Property Act (O.C.G.A. § 44-6-180)
 - *Background:*
 - Uniform Act enacted in 2013; adopted in over 21 states
 - Designed to preserve family wealth passed to the next generation in the form of real property
 - More streamlined process to statutory or equitable partition
 - At least \$34 billion in property where no owner has clear title
 - Georgia Heirs Property Law Center

Partition Actions

- Heirs Property Act (O.C.G.A. § 44-6-180)
 - *Procedures:*
 - Heirs property has to be held as (i) tenants in common, (ii) one or more acquired title from a relative, and (iii) 20% or more of the interests are held by relatives, 20% or more of the interests are held by an individual who acquired title from a relative, or 20% or more of the cotenants are relatives
 - Court determines fair market value through a mandatory appraisal (O.C.G.A. § 44-6-184(a))
 - If property is ordered to be sold, another cotenant may buy out the others (O.C.G.A. § 44-6-185)
 - If all interests are not sold, the Court may order a partition in kind (O.C.G.A. § 44-6-186(a)(1))
 - Allows open market sale of the property or public sale (if more economically advantageous and in the best interests of all owners) (O.C.G.A. § 44-6-187(a))

Fraudulent Transfer Actions

- Uniform Voidable Transactions Act (O.C.G.A. § 18-2-70 et seq)
 - *Background:*
 - Uniform Act that has been enacted in many states
 - Many provisions are based on avoidance portions of the Bankruptcy Code
 - Allows creditors and potential creditors to bring property back into the debtor so that it can be collected upon
 - *Types of Fraudulent Transfers:*
 - Actual fraudulent transfer (O.C.G.A. § 18-2-74(a))
 - *Transfer made “[w]ith actual intent to hinder, delay, or defraud any creditor”*
 - *Courts look at badges of fraud (e.g., insider, retained possession, insolvency, time period in which the transfer was made)*
 - *If one or more of these present, the Court may determine the transfer be avoided*
 - *Good faith is a defense to an actual fraudulent transfer (O.C.G.A. § 18-2-78(b)(1)(B))*

Fraudulent Transfer Actions

- Uniform Voidable Transactions Act (O.C.G.A. § 18-2-70 et seq)
 - *Types of Fraudulent Transfers (cont'd):*
 - Constructive fraudulent transfer (O.C.G.A. § 18-2-75)
 - *Requirements are (i) transfer was made after the obligation was incurred, (ii) the debtor did not receive reasonably equivalent value, and (iii) the debtor was insolvent at the time of the transfer or became insolvent as a result (O.C.G.A. § 18-2-75(a))*
 - *If these requirements are present, the Court will reverse the transfer*
 - *Good faith is not a defense*
 - Remedies (O.C.G.A. § 18-2-77)
 - *Avoidance of the transfer*
 - *Attachment or provisional remedy against the property*
 - *Injunctive relief*

Fraudulent Transfer Actions

- Uniform Voidable Transactions Act (O.C.G.A. § 18-2-70 et seq)
 - *Remedies (O.C.G.A. § 18-2-77) (cont'd)*
 - Appointment of a receiver
 - Judgment against the first transferee
 - Other equitable remedies
 - *Practice Tips:*
 - Always name the first transferee as a party to the lawsuit
 - Always record a notice of lis pendens against the original deed into the debtor and the deed into the first transferee to ensure the property is not sold to a bona fide purchaser for value (who would then have a defense)

Bankruptcy Avoidance Actions

- Bankruptcy Avoidance Actions

- *Role of the Trustee:*

- Collect and reduce to money the property of the bankruptcy estate
 - Investigate transfers of property
 - Various other duties and obligations

- *Property of the Bankruptcy Estate (11 U.S.C. § 541):*

- Extremely broad and includes all different types of property and transfers out of property pre-petition

Bankruptcy Avoidance Actions

- Bankruptcy Avoidance Actions

- *Avoidance Actions (11 U.S.C. §§ 544(b), 547, and 548):*

- Section 544(a)(3) states that the Trustee is in the same position as a hypothetical bona fide purchaser who bought property from the debtor on the petition date and simultaneously perfected the transfer
 - Allows a Trustee to avoid the transfer potentially up to four (4) years pre-petition under the Uniform Voidable Transactions Act

- *Recordation:*

- The Gordon I and Gordon II cases turned on this hypothetical bona fide purchaser and whether a security instrument should have been accepted by the Clerk for recording where it was not properly attested
 - Various savings statutes passed by the Georgia General Assembly in mid-2010s

General Equity Actions

■ General Equity Actions

- *Equity jurisdiction vested in Superior Courts and State-Wide Business Court (O.C.G.A. § 23-1-1)*
- *It is extremely broad: “[g]enerally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy as were allowed and practiced in England.” (O.C.G.A. § 23-1-2)*
- *Various Defenses: adequate remedy at law (O.C.G.A. § 23-1-5), unclean hands (O.C.G.A. § 23-1-10), unequal equities (O.C.G.A. § 23-1-11), and laches (O.C.G.A. § 23-1-25)*
- *There is no statutory right to trial by jury in equity cases in general. Cawthon v. Douglas County, 248 Ga. 760 (1982)*
- *Practice Tip: If the case is convoluted or complex, it is good practice to assert a general equity claim at least in the alternative, which provides the Court with broad discretion to determine the rights of the parties if an alternative remedy at law is not available*

QUESTIONS?

David S. Klein
Rountree Leitman Klein & Geer, LLC
www.rlkglaw.com
dklein@rlkglaw.com
(404) 856-0540



ROUNTREE
LEITMAN KLEIN & GEER
LLC