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IN THE COURT OF APPEALS
STATE OF GEORGIA

JOHN RICHARDS AND)	
CHATTAHOOCHEE RIVER CLUB)	
HOMEOWNERS ASSOCIATION, INC.,)	
)	
Appellants,)	
)	Appeal No: A19A2076
v.)	
)	
VINAY BOSE,)	
MOMMIES PROPERTIES LLC,)	
FH PARTNERS LLC)	
)	
Appellees.)	

APPELLANTS' BRIEF

COME NOW John Richards and Chattahoochee River Club Homeowners Association, Inc., Appellants herein, and show the Court as follows:

Part One: Proceedings Below and Material Facts Relevant to Appeal

On October 24, 2018, the above-styled case was filed in the Superior Court of Forsyth County, Georgia. The Complaint, brought by Vinay Bose, Mommies Properties LLC and FH Partners LLC, was titled as a Petition to Quiet Title and included claims for Quiet Title against All of the World, Conventional Quiet Title, Declaratory Judgment, along with tort claims including Defamation of Title, Defamation of Persons, Intentional Infliction of Emotional Distress, Interference with Easement and a claim for attorneys' fees. (R-19-125).

Chattahoochee River Club Homeowners Association, Inc. (hereinafter referred to as “CRC”) was served via its registered agent on October 25, 2018. (R-128). John Richards was first served on October 25, 2018. (R-129-132). An Order was entered November 21, 2018, extending the time for CRC and for John Richards to file an Answer until December 14, 2018. (R-145).

On the afternoon of December 14, 2018, counsel for CRC and John Richards, Clay Ratterree, gave the Answer for CRC and John Richards to his assistant for filing with the instruction that the Answer was to go out that afternoon. (R-195-196). Clay Ratterree did not realize that e-filing was unavailable in Forsyth County Superior Court on Friday, December 14, 2018.¹ Mr. Ratterree’s assistant, upon learning that e-filing was not available in Forsyth County Superior Court on the afternoon of Friday, December 14, 2018, sent the Answer to the Superior Court of Forsyth County via UPS Second Day Air for morning delivery. (R-198-199). The Answer for CRC and John Richards was clocked in by the Clerk on Tuesday, December 18, 2018. (R-148-178).

CRC and John Richards were unaware that they were in default until Appellees filed a Motion for Default Judgment on January 7, 2019. (R-179-186). Appellants paid costs and filed a Motion to Open Default the following day, January 8, 2019. (R-187-200). On February 25, 2019, the trial court held a

¹ E-filing became available in Forsyth County Superior Court on January 2, 2019.

hearing on the motions. That hearing was transcribed and the transcript is attached. (T-1-78). On February 27, 2019, the trial court issued an Order, *nunc pro tunc* to February 25, 2019. (R-14-18). That Order is the subject of this Appeal, the trial court having granted a certificate of immediate review and this Court having thereafter granted Appellants' Application for Interlocutory Appeal.² (R-840-841 and R-13).

The trial court found that the case was not in default as to the Quiet Title Against All the World claim because the Special Master had not yet caused service to issue as contemplated by O.C.G.A. Section 23-3-65. Woodruff v. Morgan County, 284 Ga. 651 (2008). (R-14-18).

As to the Conventional Quiet Title claim, the trial court found that, “[a]dditional parties may need to be joined. Specifically, for example, Bentwood Stables, LLC and the estate of Linda Allen. Defendants have therefore established a proper case. However, while CRC HOA set up a meritorious defense, offered to plead *instanter*, and made a showing under oath, John Richards did not. The verification attached to the Defendants' joint Answer is signed by John Paximadis, under oath, on behalf of CRC HOA and with express permission and authorization

² Although the Order was *nunc pro tunc*ed to February 25, 2019, it was filed with the Clerk on February 27, 2019, so the Certificate of Immediate Review was issued within 10 days of the entry of the Order. See generally, Bevington v. Cavalry Portfolio Servs., LLC, 319 Ga. App. 746, 748, 738 S.E.2d 329 (2013).

by John Richards. John Richards has not otherwise made a showing under oath.” (R-14-18).

The trial court granted CRC’s motion to open default on the Conventional Quiet Title claim finding that CRC had made a proper case. (R-14-18). The trial court denied John Richards’ motion to open default on the Conventional Quiet Title claim finding that he had not made a showing under oath as required by O.C.G.A. Section 9-11-55(b). (R-14-18). The trial court did not grant Plaintiffs’ Motion for Default Judgment as to the Conventional Quiet Title claim. (R-14-18).

The day following the hearing in Forsyth County, on February 26, 2019, and the day before the trial court issued its Order, an Amended Answer was filed with John Richards’ verification.³ (R-764-766). The failure to verify a pleading is an amenable defect and cannot be the basis for a default judgment. For this reason, the trial court dated its Order *nunc pro tunc* to the day before the verification was filed but did not grant the default judgment on this ground. (R-14-18). By doing so, the trial court left John Richards in default with no means to cure on the basis of an amenable defect.

³ The verification was signed by John Richards on December 17, 2018. Mr. Richards was out of state at the time the Answer was to be filed and the Answer was going to be supplemented with his verification when the original was received. It was not discovered until the hearing that the Amended Answer with the verification had not yet been filed. It was filed the following day, February 26, 2018. (R-764-766).

As to the Declaratory Judgment claim, the trial court found that, “Defendants have failed to assert a proper case⁴ and set up a meritorious defense. There are no additional parties who should be joined in order to afford complete relief.” (R-14-18). Therefore, the trial court found a proper case had been made by CRC as to one claim, the Conventional Quiet Title claim, and not by CRC as to a different claim, the Declaratory Judgment claim. (R-14-18). The trial court focused solely on whether CRC had shown a meritorious defense but the trial court only considered one of several defenses asserted by CRC and John Richards in the Answer filed on December 18, 2018. (R-14-18 and R-148-178). The failure to join necessary and indispensable parties was not the only defense asserted by CRC and John Richards although it was the only defense discussed by the trial court. (R-14-18 and R-148-178). The trial court focused on that defense with respect to the Conventional Quiet Title claim because it was clear to the trial court that additional parties would be required to be added as discussed in the Order. However, the Answer filed by CRC and John Richards on December 18, 2018, raised other defenses including, pertinent to the Declaratory Judgment claim, the defense that the Complaint failed to state a claim upon which relief may be granted under O.C.G.A. Section 9-11-12(b)(6). (R-148-178). The trial court abused its discretion in failing to recognize and consider that defense because the Declaratory

⁴ This contradicts the trial court’s finding one page earlier that the defendants had made a proper case. (R-14-18).

Judgment claim was facially invalid to state a claim under the Declaratory Judgment Act for the reason that it failed to set forth a justiciable controversy. (R-19-125). Without such controversy, the trial court was without jurisdiction to declare anything. Thunderbolt v. River Crossing Apartments, 189 Ga. App. 607, 608, 377 S.E.2d 12 (1988). With respect to the Declaratory Judgment claim, the trial court again noted only as to John Richards, that he had failed to make a showing under oath, although an Amended Answer had been filed before the trial court entered its Order and along with it, John Richards' verification. (R-14-18 and R-764-766). The trial court denied the Motion to Open Default of CRC and John Richards and granted Default Judgment on this count to Plaintiffs. (R-14-18). The trial court abused its discretion in so doing.

The trial court declared with respect to the Declaratory Judgment claim, pleaded as an alternative theory of recovery to the Quiet Title claims, that "the terms of the covenants outside of the Allen chain of title did not affect or bind Plaintiffs or the property located at 3450 Bentwood Drive, Forsyth County, Georgia. Plaintiffs did not have actual or constructive knowledge of the covenants. The covenants outside of the Allen chain of title were outside of Plaintiff's, and FH Partner, LLC's chain of title with Linda Allen. No one searching title in the grantor index under the developer's name (Silver Creek Development, LLC) for the period of ownership, up to the date title to the property transferred to plaintiff

Mommies Properties, LLC, could have seen the covenants outside the Allen chain of title in that they were not recorded in the relevant period of the chain of title.” (R-14-18).

The trial court did not identify what covenants it was referring to as “outside of the Allen chain of title” and it did not identify the “Allen chain of title” except to make reference to the Petition to Quiet Title. (R-14-18). There are easements and other matters of record that impact the property at issue but the trial court would not have known that from its review of the Petition to Quiet Title. The declaratory judgment in its current default judgment form is vague, erroneous, will likely cause a substantial error at trial and will adversely affect the rights of CRC and John Richards.⁵ (R-14-18). Additionally, by issuing this declaratory judgment in its current form when there was not even jurisdiction based upon the claim as pleaded, the trial court over-reached and sought to decide an issue dispositive of the Quiet Title claims in the case. The trial court erred in so doing.

During oral argument, Appellees’ counsel withdrew his request for default judgment on Counts 3, 4, 5, 6 and 7 waiving the right to default judgment. (T- 59); Laurel Baye Healthcare of Macon, LLC v. Neubauer, 315 Ga. App. 474, 476, 726

⁵ To further complicate matters, Appellees have since filed a nearly identical action against another individual Homeowners Association Board member, Jeb Sundgren, seeking similar declarations by the trial court and including virtually identical claims for Quiet Title against all the World and Conventional Quiet Title thereby creating additional opportunity for inconsistent results on the title issues.

S.E.2d 670 (2012) (The right to default judgment may be waived). The Court granted the Motion to Open Default as to those counts (3-7) to both CRC and also John Richards. (R-14-18). The Order is silent as to the prerequisites of O.C.G.A. Section 9-11-55(b) and as to the basis for granting the Motion to Open Default on these claims. (R-14-18). The trial court's silence on the prerequisites of O.C.G.A. Section 9-11-55(b) in the face of its grant of the Motion to Open Default on these claims, Counts 3, 4, 5, 6 and 7, constitutes an acknowledgement by the trial court that it knew that John Richards had, by filing his Verification on February 26, 2019, made a showing under oath at the time the trial court entered its Order since otherwise the trial court would not be authorized to open default as a matter of law.⁶ (R-14-18 and R-764-766).

Part Two: Enumeration of Errors and Jurisdictional Statement

I. Failure to verify an Answer is an amendable defect. Shuford v. Jackson, 139 Ga. App. 469, 228 S.E.2d 605 (1976). A pleading may be amended at any time prior to the entry of a pre-trial order as a matter of right under O.C.G.A. Section 9-11-15(b). The John Richards verification was filed on February 26, 2019, before

⁶ It is also noteworthy that the Court gave no reason for its decision to *nunc pro tunc* its Order to the day before the John Richards verification was filed. (R 14-18). A court's power to amend *nunc pro tunc* is the power to correct inadvertent errors or omissions in the record. Citizens for Ethics in Government, LLC v. Atlanta Dev. Auth., 303 Ga. App. 724, 734, 694 S.E.2d 680 (2010). This Court should not be permit that power to be used as it was by this trial court to foreclose a party's right to amend its pleading with a verification of that pleading.

the trial court issued its Order. (R-764-766). Therefore, the trial court abused its discretion in finding that John Richards had not made a showing under oath as required by O.C.G.A. Section 9-11-55(b) at the time it entered its Order on February 27, 2019. (R-14-18 and R-764-766). The trial court implicitly acknowledged this by granting John Richards' Motion to Open Default as to Counts 3, 4, 5, 6 and 7 because if that were not the case, the Court would be without authority under O.C.G.A. Section 9-11-55(b) to open default as to any count. (R-14-18).

II. The trial court failed to apply the proper legal standard under O.C.G.A. Section 9-11-55(b) in its analysis and its analysis was incomplete. (R-14-18). The trial court did not properly analyze all of the conditions precedent under O.C.G.A. Section 9-11-55(b) and did not apply the correct legal standard to determine whether a proper case was made. (R-14-18). A determination of proper case requires that the trial court find, in addition to considering whether a meritorious defense exists, and CRC and John Richards submit that the trial court may not decline to consider properly raised defenses such as those raised in the December 18, 2018 Answer, that a reasonable explanation for the failure to timely file the Answer exists. Accordingly, the trial court abused its discretion because it did not properly apply the correct legal standard and its application of the standard was incomplete. Samadi v. Fed. Home Loan Mortg. Corp., 344 Ga. App. 111, 118-119,

809 S.E.2d 69 (2017). On a question of law, such as the correct legal standard and the application of that standard, the Court of Appeals owes no deference to the trial court and will apply the plain legal error standard of review.

III. The trial court was without jurisdiction to issue its Declaration with respect to the Declaratory Judgment claim because the claim, on its face, failed to establish a justiciable controversy. (R-19-125). CRC and John Richards raised the defense in their December 18, 2018 Answer that Appellees had failed to state a claim upon which relief can be granted. (R-148-178). That defense applies to the Declaratory Judgment claim. (R-19-125 and R-148-178). The trial court's declaration is also vague, ambiguous, erroneous, will probably cause a substantial error at trial and will adversely affect the rights of CRC and John Richards. While there is an Agreement regarding Development concerning Plaintiff's property that was recorded after the 2005 transfer of the property to Plaintiff Mommies that is referenced in the Petition, that Agreement is not specifically referenced by the trial court's Declaration and there are other Easements and such restrictions of record that impact the property that were not considered or addressed by the trial court. (R-14-18). By issuing this declaratory judgment, without jurisdiction to do so, the trial court sought to decide an issue potentially dispositive of other claims in the case like the Quiet Title claim. The trial court erred in so doing.

Jurisdictional Statement

Jurisdiction for this Appeal is properly in the Court of Appeals as this matter involves claims concerning title to land and a declaratory judgment claim. O.C.G.A. Section 15-3-3.1.

Part Three: Argument and Citation of Authorities

I. The John Richards's verification, made as an amendment to a pleading as a matter of right under O.C.G.A. Section 9-11-15, constitutes a showing made under oath as required by O.C.G.A. Section 9-11-55(b). The trial court abused its discretion by refusing to recognize the verification as a showing under oath and also by back dating its Order to the day before the verification was filed in an effort to prevent the verification from functioning as a showing under oath under O.C.G.A. Section 9-11-55(b).

The failure to verify is an amendable defect.⁷ Shuford v. Jackson, 139 Ga. App. 469, 228 S.E.2d 605 (1976). A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. O.C.G.A. Section 9-11-15(a). The right to amend pleadings under the Georgia Civil Practice Act is exceedingly broad and O.C.G.A. Section 9-11-15(a) is to be

⁷ Similarly, the failure to file a Rule 15 Certificate of Default is an amenable defect and Appellees failed to file a Rule 15 Certificate of Default. (R-179-186).

liberally construed in favor of the allowance of amendments.⁸ Bandy v. Hospital Authority of Walker County, 174 Ga. App. 556, 557, 332 S.E.2d 46 (1985).

On February 26, 2019, when the December 18, 2018 Answer was amended to include the John Richards verification, there had been no pretrial order entered, no order entered on the Motion for Default Judgment, and no order entered on the Motion to Open Default Judgment and no final judgment. (R-764-766). Under O.C.G.A. Section 9-11-15(a), John Richards could amend to supplement the Answer with his verification as a matter of right on February 26, 2019.

O.C.G.A. Section 9-11-55(b) requires as a condition precedent to opening default that costs are paid, a showing under oath, a meritorious defense, an offer to plead instanter and an announcement of ready to proceed to trial. With respect to the meritorious defense requirement, a verified Answer in which defenses are asserted to the plaintiff's claims meets that requirement. La Mara X, Inc. v. Baden, 340 Ga. App. 592, 597, 798 S.E.2d 105 (2017), citing, Exxon Corp. v. Thomason, 269 Ga. 761(1), 504 S.E.2d 676 (1998).

The trial court stated at pages 3 and 4 of its Order that John Richards had not made a showing under oath. (R-14-18). John Richards filed his verification of the December 18, 2018 Answer with an Amended Answer filed February 26, 2019,

⁸ As the Court explained in MCG Development Corp. v. Bick Realty Co., 140 Ga. App. 41, 230 S.E.2d 26 (1976), "The right to amend is as broad as the Atlantic Ocean and as saving as the power of salvation."

before the trial court issued its Order. (R-14-18 and R-764-766). The trial court implicitly acknowledged that John Richards had met the requirement of a showing under oath with his verification filed on February 26, 2019 by granting CRC and John Richards' Motions to Open Default as to Counts 3, 4, 5, 6 and 7 because without a showing under oath as required by O.C.G.A. Section 9-11-55(b), the Court was without authority to grant that Motion to Open Default even in a waiver situation. (R-14-18).

The trial court abused its discretion in back dating its February 27, 2019 Order by *nunc pro tunc* to February 25, 2019 for the purpose of trying to foreclose the John Richards verification that was filed of record on February 26, 2019. A court's power to amend *nunc pro tunc* is the power to correct inadvertent errors or omissions in the record to reflect the truth of what happened; it does not include the power to supply judicial omissions so as to include what a court might or should have decided, but did not actually so decide. Citizens for Ethics in Gov't, LLC v. Atlanta Dev. Auth., 303 Ga. App. 724, 734, 694 S.E.2d 680 (2010)(citations omitted). The trial court is not given the power to *nunc pro tunc* an order for the purpose of foreclosing a party's right to amend under O.C.G.A. Section 9-11-15(a) or for the purpose of preventing a party from making a showing under oath as required by O.C.G.A. Section 9-11-55(b). Those are improper

purposes for the use of that power and this Court should address such misuse in this situation for precedent purposes.

II. The trial court failed to apply the proper legal standard in its analysis of the Motion to Open Default as to the Conventional Quiet Title claim and the Declaratory Judgment claim. (R-14-18). Specifically, the trial court did not properly analyze the conditions precedent under O.C.G.A. Section 9-11-55(b) and then did not use the correct legal standard to determine whether a proper case was made because such determination requires that the trial court find, in addition to considering whether a meritorious defense exists (and CRC and John Richards submit that the trial court can't choose to ignore defenses raised in a filed Answer) whether a reasonable explanation for failure to timely answer exists. (R-14-18). Generally, this is reviewed for abuse of discretion, however, where the application of the legal standard is incorrect or incomplete, the trial court has abused its discretion. Moreover, on a question of law, such as the correct legal standard, the Court of Appeals owes no deference to the trial court and will apply the plain legal error standard of review.

Under O.C.G.A. Section 9-11-55(b), a prejudgment default may be opened on one of three grounds: providential cause, excusable neglect, or a proper case. The statute conveys very ample powers as to opening defaults; not only providential cause, which is broad, and excusable neglect, which is still broader,

but finally, as if reaching out to take in every conceivable case where injustice might result if the default were not opened, the section goes on to say, “where the judge from all the facts shall determine that a proper case has been made.” Boggs Rural Life Ctr. v. los Capital, 255 Ga. App. 847, 567 S.E.2d 94 (2002). The “proper case” ground is broader than the other two. Its essence is the discretion of the trial judge. Id. The defendant must meet four conditions before the trial court may consider whether it met any of these three grounds. It must (1) make a showing under oath; (2) offer to plead immediately; (3) announce ready for trial; and (4) set up a meritorious defense. Id.

In this case, Appellants paid costs prior to filing the motion to open default.⁹ Freese II, Inc. v. Mitchell, 318 Ga. App. 662, 663, 734 S.E.2d 491 (2012) (Payment of costs is a condition precedent for opening default under O.C.G.A. Section 9-11-55(b)). Appellants made a showing under oath regarding the circumstances of default and providing a reasonable explanation of same as required. Samadi v. Fed. Home Loan Mortg. Corp., 344 Ga. App. 111, 118, 809 S.E.2d 69 (2017) (Default may be opened under the proper case analysis where a reasonable explanation for the failure to timely file exists). (R-195-199). A showing under oath includes an affidavit filed with the motion to open default setting out the reasons for default and where no verified answer has been filed, the

⁹ (R-195-196).

defendant's meritorious defense. Id. at 847-848; La Mara X, Inc. v. Baden, 340 Ga. App. 592, 597, 798 S.E.2d 105 (2017), citing, Exxon Corp. v. Thomason, 269 Ga. 761(1), 504 S.E.2d 676 (1998)(a meritorious defense may also be shown by filing an answer in which defenses are asserted to the plaintiff's claims). Appellants filed on December 18, 2018, a twenty nine page Answer thus satisfying the condition precedent of an offer to plead instanter because the Answer was filed weeks before the motion to open default. (R-148-178). Appellants' twenty nine page Answer filed on December 18, 2018 requested a jury trial and that, taken together with Clay Ratterree's affidavit that he stands ready to proceed with a trial of the matter satisfies the condition precedent of an announcement of ready to proceed to trial. La Mara X, Inc. v. Baden, 340 Ga. App. 592, 597, 798 S.E.2d 105 (2017), citing, Powell v. Eskins, 193 Ga. App. 144, 145, 387 S.E.2d 389 (1989)(attorney's appearance demanding a trial by jury and stating that defendant 'was ready to plead and proceed with adjudication of the case' satisfied the condition that defendant announce ready to proceed with trial); also citing, Exxon Corp. v. Thomason, 269 Ga. 763, 504 S.E.2d 676 (1998)(additional citations omitted). (R-148-178 and R-195-196).

The last requirement is that of a showing of a meritorious defense. A defendant can establish a meritorious defense by showing that if relief from default is granted, the outcome of the suit may be different from the result if default

stands. Bilbo v. Five Star Athlete Management, Inc., 334 Ga. App. 208, 210, 778 S.E.2d 834 (2015). This test does not require a showing that the defendant will completely defeat the plaintiff's claim and is consistent with the strong public policy of deciding cases on their merits. Id. at 211, citing, Legacy Hills Residential Assn. v. Colonial Bank, 255 Ga. App. 144, 145-146, 564 S.E.2d 550 (2002). A meritorious defense may be shown by filing an answer in which defenses are asserted to the plaintiff's claims. La Mara X, Inc. v. Baden, 340 Ga. App. 592, 597, 798 S.E.2d 105 (2017), citing, Exxon Corp. v. Thomason, 269 Ga. 761(1), 504 S.E.2d 676 (1998). In this case, the Answer filed on December 18, 2018, raised defenses that included statute of frauds, failure to join one or more necessary parties, and also that the Complaint failed to state a claim upon which relief may be granted. (R-148-178). CRC and John Richards' December 18, 2018 Answer satisfied this requirement. La Mara X, Inc. 340 Ga. App. at 597. While the trial court focused only on the defense of failure to join necessary and indispensable parties in its Order, the defense of failure to state a claim upon which relief may be granted under O.C.G.A. Section 9-11-12(b)(6) applies to each of the claims, including specifically to the Declaratory Judgment claim. (R-14-18). Appellants submit that the trial court abused its discretion in failing to consider all defenses properly raised in the Answer.

The trial court did not address each of the four prerequisites under O.C.G.A. Section 9-11-55(b) in its Order. (R-14-18). It found instead at page 3 of the Order that CRC “set up a meritorious defense, offered to plead instanter, and made a showing under oath” and that, CRC had, therefore, made a proper case as to the conventional quiet title claim. (R-14-18). The trial court also failed to provide its analysis of the grounds for proper case which should have included a reasonable explanation for the delay in filing and meritorious defense instead of only meritorious defense and the Court considered only the defense of failure to join necessary and indispensable parties. (R-14-18). The trial court further found at page 3 of its February 27, 2019 Order that John Richards had not made a showing under oath, even though John Richards had amended his Answer the day prior with his verification and that was the only difference between his showing and that of CRC. (R-14-18 and R-764-766).

With respect to the trial court’s analysis under O.C.G.A. Section 9-11-55(b) concerning the declaratory judgment claim, there isn’t one, except that the trial court found again that John Richards had made no showing under oath, thereby ignoring that the verification was filed prior to the entry of the Order and focusing instead on the meritorious defense, in which the trial court considered only the defense of the failure to join necessary and indispensable parties and did not consider the defenses of failure to state a claim upon which relief may be granted

under O.C.G.A. Section 9-11-12(b)(6) or the statute of frauds defense both of which were raised in the Answer filed of record on December 18, 2018 and both of which were part of the pleadings before the trial court. (R-14-18, R-148-178 and R-764-766).

A statute that confers discretion on a judge to decide a particular question also imposes a correlative duty to exercise that discretion when the occasion arises. Boggs Rural Life Ctr. v. los Capital, 255 Ga. App. 847, 848, 567 S.E.2d 94 (2002); Rapid Taxi Co. v. Broughton, 244 Ga. App. 427, 429, 535 S.E.2d 780 (2000). A trial court abuses its discretion where its application of the legal standard is incomplete and that is grounds for remand. Samadi v. Fed. Home Loan Mtg. Corp., 344 Ga. App. 111, 119, 809 S.E.2d 69 (2017). The trial court here abused its discretion and its application of the legal standard was incomplete and failed to consider the prerequisites of O.C.G.A. Section 9-11-55(b) and it also failed to consider the requirements for the proper case grounds. (R-14-18). Additionally, “[w]here it is apparent that a trial court’s judgment rests on an erroneous legal theory, an appellate court cannot affirm. When the issue is a question of law, we owe no deference to the trial court’s ruling and apply the plain legal error standard of review.” Laurel Baye Healthcare of Macon, LLC v. Neubauer, 315 Ga. App. 474, 475, 726 S.E.2d 670 (2012). To the extent that the trial court failed to apply the correct legal standard to its analysis, that is a question of law for this Court.

Additionally, the trial court necessarily found that John Richards and CRC had met the conditions precedent under O.C.G.A. Section 9-11-55(b) and made a proper case or it could not have granted Defendants' motion to open default as to Claims 3, 4, 5, 6 and 7 as a matter of law. (R-14-18). Therefore, the trial court's determinations are inconsistent within its own Order from claim to claim as to whether or not the conditions precedent have been met and whether a proper case has been made. (R-14-18).

III. The trial court's declaration with respect to the declaratory judgment claim, is vague, ambiguous, erroneous, will likely cause a substantial error at trial and will adversely affect the rights of Appellants. There is an Agreement regarding Development concerning Appellee's property that was recorded after the 2005 transfer of the property to Appellee Mommies Properties LLC, however, that Agreement is not specifically referenced by the Court's Order and there are other Easements and such restrictions that impact the property that are not considered or addressed by the Court's declaration. Accordingly, by issuing this declaratory judgment without sufficient information to do so, the trial court sought to decide an issue potentially dispositive of other claims in the case, where default judgment was not appropriate, like the Quiet Title claim. The trial court erred in so doing. Additionally, Appellees failed to state a claim upon which relief could be granted in their declaratory judgment claim as they failed to allege a justiciable controversy

and otherwise properly plead a declaratory judgment claim. (R-19-125). For this additional reason, the trial court's declaration is in error because without a justiciable controversy, the trial court was without jurisdiction to issue such declaration. (R-19-125).

A declaratory judgment may not be granted in the absence of a justiciable controversy. Thunderbolt v. River Crossing Apartments, 189 Ga. App. 607, 608, 377 S.E.2d 12 (1988). The object of a declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated. Id. "As many times pointed out by this court, its purpose is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped into a hole." Id. Without such actual or justiciable controversy, the trial court is without jurisdiction to enter a judgment. Id., citing, Kaylor v. Kaylor, 236 Ga. 777, 225 S.E.2d 320 (1976).

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. Atlanta Nat'l League Baseball Club, Inc. v. F.F., 328 Ga. App. 217, 219, 761 S.E. 2d 613 (2014). A party seeking such a judgment must establish that it is necessary to relieve himself of the risk of taking from future action that, without direction, would jeopardize his interests. Id. at 220. A declaratory judgment will

not lie where the rights between the parties have already accrued, because there is no uncertainty as to the rights of the parties or risk as to taking future action. Id. It follows from these principles that, as both Georgia appellate courts have held, “declaratory judgment is not available to a party merely to test the viability of [that party’s] defenses.” Id. at 220-221. Where a party seeking declaratory judgment does not show that it is in a position of uncertainty as to an alleged right, dismissal of the declaratory judgment action is proper; otherwise, the trial court will be issuing an advisory opinion, and the Declaratory Judgement Act makes no provision for a judgment that would be advisory. Id. at 221, (citations omitted).

Appellees pleaded their declaratory judgment claim “in addition to or in the alternative to the previously requested relief” which relief was their claims for Quiet Title Against All the World and their Conventional Quiet Title claim. (R-19-125, para. 40). Appellees contend “that the subject documents clearly do not bind the owners of the Property.” (R-19-125, para. 41). Appellees allege further that, in the event that “the invalidity of the Covenant Outside of the Allen Chain of Title is not clear as a matter of law under the facts adduced in evidence, then in the alternative, the disputes and differing opinions regarding title and access rights across the Property as described above have created uncertainty.” (R-19-125, para 42). Appellees further pleaded that “in the event the invalidity of the Covenant Outside of the Allen Chain of Title is not clear as a matter of law under the facts

adduced in evidence, then in the alternative, a declaratory judgment or decree on these issues would eliminate the uncertainty and controversy giving rise to this action.” (R-19-125, para. 43). The factual allegations underpinning this claim, as pleaded, even if taken as admitted, do not show an actual or justiciable controversy that would render the trial court with jurisdiction to enter such a judgment. Thunderbolt v. River Crossing Apartments, 189 Ga. App. 607, 608, 377 S.E.2d 12 (1988); citing, Kaylor v. Kaylor, 236 Ga. 777, 225 S.E.2d 320 (1976).

CRC and John Richards in their December 18, 2018 Answer raised the O.C.G.A. Section 9-11-12(b)(6) defense that the Plaintiffs had failed to state a claim upon which relief can be granted. (R-148-178). This defense applies to this declaratory judgment claim. The trial court failed to consider this defense. (R-14-18). The failure of the trial court to consider this defense was an abuse of discretion and error where, on its face, the Declaratory Judgment claim does not allege a justiciable controversy. (R-19-125).

Furthermore, a default judgment does not admit conclusions of law. Crawford v. Dammann, 277 Ga. App. 442, 453, 626 S.E.2d 632 (2006). To the extent that the trial court attempted to declare a legal conclusion regarding title issues in a default judgment, such declaration was an abuse of the trial court’s discretion and not supported by the law.

Conclusion

The rule permitting opening of default is remedial in nature and should be liberally applied, for default judgment is a drastic sanction that should be invoked only in extreme situations. Albee v. Krasnoff, 255 Ga. App. 738, 740, 566 S.E.2d 455 (2002). Generally, a default should be set aside where the defendant acts with reasonable promptness and alleges a meritorious defense. Id. Among the factors which may be considered are whether and how the opposing party will be prejudiced by the opening of default; whether the opposing party elected not to raise the default issue until after the time had expired for the defaulting party to open default as a matter of right; and whether the defaulting party acted promptly to open default upon learning that no answer had been either filed or timely filed. Id.

In this case, CRC and John Richards filed an Answer on Tuesday, December 18, 2018, four days late including a weekend, after learning on Friday afternoon, December 14, 2018, that Forsyth County Superior Court did not have e-filing. (R-195-196). The Forsyth County Superior Court began e-filing on January 2, 2019. Appellees waited until after the time had closed to open default as a matter of right and filed a Motion for Default Judgment. (R-179-186). CRC and John Richards moved to open default the next day. (R-187-200). Although the John Richards verification was filed by Amended Answer on February 26, 2019, it was filed

within the time for so filing as a matter of right, under O.C.G.A. Section 9-11-15, and before the trial court issued its Order. (R-764-766). Appellees have conducted extensive non-party discovery in the interim and have suffered no prejudice.

The trial court's analysis under O.C.G.A. Section 9-11-55(b) was incomplete, inaccurate and contradictory and constitutes an abuse of discretion. (R-14-18). The trial court's failure to use the proper legal standard is subject to the plain legal error standard of review. The same standard of review applies to the trial court's declaration in the declaratory judgment claim that fails to present a justiciable controversy.

The Order is erroneous and will likely cause a substantial error at trial and adversely affect the rights of the Appellants. The establishment of precedent is desirable with respect to the trial court's abuse of the *nunc pro tunc* power, and also as to the trial court's declaration where there was no justiciable controversy alleged within the declaratory judgment claim and, therefore, no jurisdiction for such declaration and also for the use of a default judgment to make a declaration of a conclusion of law.

For all of these reasons, John Richards and CRC respectfully request that this Court reverse the trial court's Order.

Respectfully submitted, this 23nd day of May, 2019.

“This submission does not exceed the word count limit imposed by Rule 24.”

Ellis, Painter, Ratterree & Adams LLP

/s/Kimberly Cofer Butler

Kimberly Cofer Butler

Georgia Bar No. 172950

Counsel for Appellants John Richards and
Chattahoochee River Club Homeowners
Association, Inc.

Post Office Box 9946
Savannah, Georgia 31412
912-233-9700 (p)
kbutler@epa-law.com

Miles Hansford & Tallant, LLC

/s/Kevin J. Tallant

Kevin J. Tallant

Georgia Bar No. 696690

Counsel for Appellants John Richards and
Chattahoochee River Club Homeowners
Association, Inc.

202 Tribble Gap Road, Suite 200
Cumming, Georgia 30040
770-781-4100
ktallant@mhtlegal.com

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following counsel of record with a true and correct copy of the foregoing document(s) as indicated below:

Stuart Teague
Keisha Chambless
Teague & Chambless, LLP
110 Samaritan Drive
Suite 109
Cumming, GA 30040

Larry C. Oldham
Larry C. Oldham, P.C.
416 Pirkle Ferry Road
Suite K-500
Cumming GA 30040

Vinay Bose
3001 Wembley Ridge
Atlanta, GA 30340

Jeffrey Schneider
Weissman P.C.
One Alliance Center
3500 Lenox Road
4th Floor
Atlanta, GA 30326

- X depositing a copy in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to ensure delivery;
- ☐ via email.
- ☐ by hand delivery.

Dated this 23rd day of May, 2019.

Ellis, Painter, Ratterree & Adams LLP

/s/Kimberly Cofer Butler

Kimberly Cofer Butler
Georgia Bar No. 172950
Counsel for Appellants

Post Office Box 9946
Savannah, Georgia 31412
912-233-9700 (p)
kbutler@epa-law.com