

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

JOHN RICHARDS, et al.,

Appellants,

vs.

VINAY BOSE, et al.,

Appellees.

CASE NO. A19A2076

BRIEF OF APPELLEES

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Appeal from the Forsyth County Superior Court

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SUMMARY OF ARGUMENT

Appellants' arguments on appeal fail for the following reasons:

- a. The trial court did not abuse its discretion in refusing to recognize John Richards' verification or by issuing its February 27, 2019 Order *nunc pro tunc* to February 25, 2019;
- b. The trial court did not abuse its discretion in ruling upon the Motion to Open Default and analyzed the same under the proper legal standard; and
- c. The trial court's holding regarding the declaratory judgment claim was not erroneous as Appellees' pleading adequately alleged the existence of a justiciable controversy necessary for a declaratory judgment claim.

BRIEF SUMMARY OF UNDERLYING ACTION

Appellees Mommies Properties, LLC ("Mommies") and Vinay Bose ("Bose") own 3.92 acres of real property located at 3450 Bentwood Drive, Cumming, Forsyth County, Georgia 30041 (the "Property") . Appellee FH Partners, LLC ("FHP") is the holder of a first priority lien against the Property. The Property is located adjacent to the Chattahoochee River Club Subdivision ("CRC") located on Georgia Highway 20 in Forsyth County. The developer of CRC built a horse barn on the Property, which Mommies purchased from a successor in title to the developer and Mommies has operated a horse stables on the Property since 2005.

CRC was developed with more than 600 homes and Appellant Chattahoochee River Club Property Owners Association, Inc. (the “Association”) is a property owners association responsible for enforcement of covenants in CRC (the “CRC Covenants”). While the Property is not subject to the CRC Covenants, there are some documents of record that either affect, or purport to affect, the Property and the document at issue in this case is a certain Agreement Regarding Development between Bentwood Stables, LLC, and Linda Allen dated December 21, 2000 and recorded October 18, 2007 at Deed Book 4929, Page 130, Forsyth County, Georgia records that purports to bind the Property (the “ARD”). (R-19; Exhibit “F”.) Since the ARD was not recorded until two years after Mommies purchased the Property, Mommies took title without constructive or actual notice of the ARD and thus is not subject to its terms. Additionally, by the terms of the ARD, any use restrictions or burdens on the Property expired more than three years ago. Despite these incontrovertible facts, the Association and some of its members have improperly sought to restrict the Appellees’ use and enjoyment of the Property, thus necessitating the filing of the underlying action.

PART I

RESPONSE TO APPELLANTS’ STATEMENT OF FACTS

While Appellants’ Brief generally sets forth the procedural history underlying

this appeal with accuracy, Appellees do not consent to a decision based on Appellants' statement of facts. Further, Appellees dispute the statement of facts contained within Appellants' Brief to the extent it interjects legal argument. For instance, Appellants' contention that "failure to verify a pleading is an amenable defect and cannot be the basis for a default judgment" is legal argument couched within Appellants' statement of facts and should not be considered as such. (Appellants' Brief at 4.) Appellees' statement of underlying facts now follows.

Appellees initiated this litigation on October 24, 2018 by filing their Petition to Quiet Title (the "Petition") which set forth seven (7) enumerated claims against Defendants/Appellants John Richards ("Richards"), Chattahoochee River Club Homeowners Association, Inc. (the "Association"), and John Doe and Jane Doe ("Doe")¹:

1. To quiet title to the Property pursuant to O.C.G.A. § 23-3-40 *et seq.* (the "Conventional Quiet Title Claim") as to certain Possible Jane and John Does who may claim an interest in the Property and pursuant to O.C.G.A. § 23-3-60 *et seq.* (the "In Rem Quiet Title Claim");
2. Declaratory judgment pursuant to O.C.G.A. § 9-4-1 *et seq.* that the "subject documents clearly do not bind the owners of the Property and that [Appellees] are entitled to quiet title"

¹ Richards, the Association, and Doe are referred to collectively herein as "Appellants."

3. Defamation of Title to the Property;
4. Defamation of Persons;
5. Intentional Infliction of Emotional Distress;
6. Interference with Easement; and
7. Expenses of Litigation pursuant to O.C.G.A. § 13-6-11.

The Petition was verified by Bose.

The Association was served via its registered agent on October 25, 2018. (R-128.) Richards was also served on October 25, 2018. (R-129-132.) On November 21, 2018, an order was entered following the filing of an unopposed motion extending the time for the Association and Richards to answer the Petition until December 14, 2018. (R-145.) Despite such extension, the Association and Richards late-filed an answer (the “Answer”) to the Petition on December 18, 2018. (R-148-178.)

An officer of the Association (John Paximadis) verified the Answer on behalf of the Association and also purported to verify the Answer on behalf of Richards. (R-177.) Richards did not verify the Answer independently of the Paximadis Verification prior to the ruling of the trial court, (R-148-178; Appellants’ Brief at 3), and same was the basis for its determination that Richards had not made the required showing under oath that would allow him to open his default. (R.14-18) Appellants did not file a motion to open default as a matter of right as authorized by O.C.G.A.

§ 9-11-55(a).

On January 7, 2019, Appellees filed a Motion for Default Judgment. (R-178-186.) On January 8, 2019, Appellants paid costs and filed a Motion to Open Default. (R-187-200.) On February 25, 2019, a hearing was held in the trial court regarding the pending motions and was taken down. (T-1-78.) On February 26, 2019, Appellants filed an Amended Answer which “amend[ed] their . . . Answer to include the Verification of [Richards].” (R-764-766.) On February 27, 2019, the trial court issued an order *nunc pro tunc* to February 25, 2019 (the “February 27 Order”). (R-14-18.)

In relevant part, the February 27 Order found that, as a result of Richards’ failure to verify the Answer, “[Richards] has not satisfied all of the conditions precedent to the opening of default under O.C.G.A. § 9-11-55(b).” (R-16.) Further, the trial court rejected Appellants’ argument that the trial court “should exercise its discretion and open the default because this is a proper case, [Appellants] have made a proper showing under oath, [] have set up a meritorious defense, and have offered to plead *instanter*.” (R-15.) Accordingly, the trial court denied Appellants’ Motion to Open Default as to (1) Appellees’ Conventional Quiet Title Claim as to Richards and (2) Appellees’ Declaratory Judgment Claim. (R-16-17.)

At the same time, the trial court conversely granted Appellees’ Motion for Default as to (1) Appellees’ Conventional Quiet Title Claim as to Richards and (2)

Appellees' Declaratory Judgment Claim. (Id.) The trial court specifically found that: (i) Richards was in default with respect to all claims because he had failed to file a verification of his pleadings and therefore necessarily did not have the ability to set up a meritorious defense,² (T-18; 73-75; R-14-18.); and (ii) that because Appellee CRC had not set up a meritorious defense showing any basis on which the ARD should be enforceable against Appellees, declaratory judgment as to Appellee CRC was appropriate. (Id.) Appellees advanced the argument that Richards had filed a proper verification because both the Paximadis Affidavit and the other Affidavits filed in support of Appellants' motion to open default were filed on Richards' behalf and the trial court considered and rejected same. (T-75.)

As a result, and pertaining specifically to Appellees' Declaratory Judgment Claim, the trial court ruled that the Covenants at issue are "outside" of Appellees' chain of title the Property and that Appellees "did not have actual or constructive knowledge" of the same. (Id.)

On March 8, 2019, the trial court issued a certificate of immediate review regarding its entry of the February 27 Order. On April 5, 2019, this Court granted Appellants' Application for Interlocutory Appeal, which was filed March 15, 2019.

² Because Appellees' counsel had represented that they were not seeking default with respect to the tort claims raised in the Action but only with respect to the quiet title and declaratory judgment claims pertaining to the Agreement Regarding Development, the trial court later correctly limited the default with respect to Richards solely to the quiet title and declaratory judgment claims.

PART II

APPELLEES' ARGUMENT AND CITATION OF AUTHORITIES AS TO EACH ENUMERATION OF ERROR

- I. The trial court did not abuse its discretion in refusing to recognize Richards' verification filed February 26, 2019 or issuing the February 27 Order *nunc pro tunc* to February 25, 2019.

Appellants contend that the “trial court abused its discretion by refusing to recognize the [Richards] verification as a showing under oath and also by back dating its [February 27] [O]rder in an effort to prevent the verification from functioning as a showing under oath under O.C.G.A. [§] 9-11-55(b).” (Appellants’ Brief at 11.) Under Georgia law, “where a trial court is vested by statute with broad discretion, appellate courts do not disturb that exercise of discretion unless it is clearly, patently, and manifestly abused.” Eagle GA I SPE, LLC v. Atreus Communities of Fairburn, Inc., 319 Ga. App. 844, 850 (2013). An abuse of discretion “occurs where a ruling is unsupported by any evidence of record or where that ruling misstates or misapplies the relevant law.” Lewis v. Lewis, 316 Ga. App. 67, 67 (2012). Here, the trial court did not abuse its discretion in refusing the recognize Richards’ late verification or by issuing the February 27 Order *nunc pro tunc* to February 25, 2019.

Generally, the right to correct an unverified pleading is sought by a motion invoking the discretion of the court, but leave to amend also may be requested in open court instead of by formal motion. Id. In this case, Appellants neither requested

leave to amend their omission of Richards' verification of the Answer nor apprised the trial court at the hearing or requested the right to do so when the trial court made it clear at the hearing that Richards' failure to verify his pleadings was the basis on which it was going to find him in default. (T-71, 75). While the Georgia Civil Practice Act provision's should be liberally construed in favor of the allowance of amendments, the trial court may deny same if it will have prejudiced the plaintiff in some way. See, MCG, 40 Ga.App. at 41. Because Richards failed to provide his verification within a reasonable period of time, failed to seek leave from the trial court to correct his error, failed to inform the trial court that he previously had verified the Answer but inadvertently failed to include same as part of his pleading, and Appellants' prosecution of their case may be prejudiced by the allowance of an untimely verification by Richards, the trial court's adjudications of default with respect to Richards should stand.

First, as to Richards' late verification, Georgia law provides that a plaintiff's verification of its pleading creates an affirmative duty that the defendant must likewise verify its defensive pleading. See O.C.G.A. § 9-10-111. A defendant's failure to verify its defensive pleading is grounds for dismissal or a strike of that defensive pleading. See Sing Recording Co. v. LeFevre Sound Studios, Inc., 122 Ga. App. 327 (1970). Further, "while it is well settled that failure to verify a pleading is an amendable defect", the right to amend to include a late verification is not without

limits, as Appellants contend. To the contrary, a late amendment to include a verification must be made within a “reasonable time” and may be disallowed where the other party’s case would be “prejudiced.” Davis v. Emmis Pub. Corp., 244 Ga. App. 795, 798 (2000) (“Generally, the failure to verify a complaint is an amendable defect, and a reasonable time is allowed for a defective pleading to be amended.”); Edenfield & Cox, P.C. v. Mack, 282 Ga. App. 816, 818 (2006) (assessing whether non-moving party would be prejudiced by allowance of pleading amendment).

Richards failed to provide his verification within a reasonable period of time and, alternatively, that their case may be prejudiced by the allowance of his late verification. First, the record indicates that Richards knew or should have known that he failed to verify his pleading as of January 7, 2019, the date Appellees filed their Motion for Default Judgment. At that point, Appellants were on notice that their pleading was not timely filed and it was incumbent upon them to assess the status of their pleadings, including Richards’ respective obligation to verify his pleading in light of Appellees’ verification of their own. Despite that, Richards failed to offer his verification for approximately seven (7) weeks thereafter and has offered no reasonable explanation as to why the original Answer did not contain Richards’ verification or why Richards’ verification was not filed between January 7, 2019 and February 26, 2019. Accordingly, Richards’ verification was not offered within a “reasonable time” from when Richards knew or should have known his pleading was

not properly verified.

Additionally, Appellees will be prejudiced should Richards be permitted to verify his pleading. Since the commencement of this litigation, Appellees have been diligently pursuing discovery from third parties and formulating litigation strategy upon the assumption that Richards would not be a participant in light of his failure to properly answer. Such efforts will be frustrated or altered should Richards be permitted to late verify his pleading, particularly in light of the fact that he had ample opportunity to do so previously.

Next, as to the Court's entry of the February 27 Order *nunc pro tunc* to February 25, 2019, Georgia law is clear that "the purpose of a nunc pro tunc entry is to record some previously unrecorded action actually taken or judgment actually rendered." In re H.L.W., 244 Ga. App. 498, 498 (2000). Accordingly, Georgia trial courts may properly issue an order *nunc pro tunc* to "backdate" or cause a written judgment "to relate back to" a prior date "of something actually done" by the trial court. Maples v. Maples, 289 Ga. 560, 561 (2011); see also Paine v. Nations, 301 Ga. App. 97, 100 (2009) ("A court's power to amend nunc pro tunc is the power . . . to reflect the truth of what happened . . .") (citations omitted); In re H.L.W., 244 Ga. App. 498, 498-499 (2000).

Here, the trial court properly issued the February 27 Order *nunc pro tunc* to February 25, 2019 because the rulings contained within the written February 27

Order were made orally by the trial court during the February 25, 2019 hearing. In other words, the February 27 Order merely reflects how the trial court ruled from the bench two days prior, albeit in written form. For example, at the conclusion of the February 25, 2019 hearing, the trial court found that “[Richards] never did sign the verification of the [A]nswer . . . [and] [h]is motion to open the default is denied . . . on the conventional quia timet [claim].” (T-71-72.) Similarly, the trial court opted to “deny [Richards’] motion to open the default as to the declaratory judgment [claim]” on the ground that “[t]here has not been a meritorious defense set up [by Richards.]” (T-73.) Those same rulings are reflected by the February 27 Order wherein the Court ruled *nunc pro tunc* to February 25, 2019 that “Richards has . . . not made a showing under oath” and, as a result, “has not satisfied all of the conditions precedent to the opening of default under O.C.G.A. § 9-11-55(b).” (R-16-18.) Accordingly, the trial court denied Richards’ “Motion to Open Default as to the conventional quiet timet claim . . . [and] Motion to Open Default” as to Appellees’ declaratory judgment claim. (R-16-18.) In light of the foregoing, it is clear that the trial court acted within its discretion in entering the February 27 Order *nunc pro tunc* to February 25, 2019, the date on which it rendered from the bench the rulings which were incorporated into its written order two days later. This was wholly proper and this Court should reject Appellants’ contentions to the contrary, including their unsubstantiated claim that the trial court did so “in an effort to prevent

the verification from functioning as a showing under oath under O.C.G.A. [§] 9-11-55(b).” (Appellants’ Brief at 11). Such a claim is particularly inaccurate in light of the fact that Richards’ verification was not filed until the day *after* the hearing during which the trial court offered the rulings memorialized by the February 27 Order.

II. The trial court did not abuse its discretion in ruling upon the Motion to Open Default and analyzed the same under the proper legal standard

Appellants assert that the trial court “failed to apply the proper legal standard in its analysis of the Motion to Open Default . . . [because it] did not properly analyze the conditions precedent under O.C.G.A. [§] 9-11-55(b) [as to] whether a proper case was made” regarding Appellees’ declaratory judgment claim. (Appellants’ Brief at 14.) As a result, Appellants contend that this Court should apply the “plain legal error standard of review” rather than review the trial court’s decision for “abuse of discretion” and, accordingly, should reverse the trial court’s February 27 order to the extent it left Richards in default as to Appellees’ conventional quiet title claim and the Association and Richards in default as to Appellees’ declaratory judgment claim. (*Id.*) Each argument should be rejected in turn.

Pursuant to O.C.G.A. § 9-11-55(b), “at any time before final judgment, the court . . . may allow [a] default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge . . . shall determine that a proper case has been made for the default to be opened” O.C.G.A. § 9-11-55(b). Such Code section “allows a prejudgment default to be

opened on one of [these] three grounds if four conditions are met: (1) showing made under oath, (2) offer to plead instanter, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense.” Muscogee Realty Development Corp. v. Jefferson Co., 252 Ga. 400, 301 (1984); see also O.C.G.A. § 9-11-55(b). “While generally the opening of a default rests with the sound discretion of the trial court, compliance with the four conditions is a condition precedent; in its absence, the trial judge has no discretion to open the default.” Brazell v. J.K. Boatwright & Co. P.C., 324 Ga. App. 502, 503 (2013) (holding that trial court did err in refusing to open default where movant failed to meet all four conditions) (citation and punctuation omitted); see also Roberson v. Gnann, 235 Ga. App. 112, 116 (1998) (“Because Roberson failed to comply with all four conditions of § 9-11-55(b), the trial court did not have discretion to open the default.”). Here, because Appellants did not meet the four conditions precedent, the trial court did not and could not abuse its discretion.

First, with respect to Richards, Appellants contend that the trial court erred by “ignoring that [Richards’] verification was filed prior to the entry of [the February 27 Order] and focusing on the meritorious defense” (Appellants’ Brief at 18.) However, it is undisputed that Richards’ answer was not verified as of February 25, 2019, the date on which the February 27 Order was entered to *nunc pro tunc*. Such ‘back dating’ of the February 27 Order was proper for the reasons set forth *supra*. In

the absence of such verification, the trial court was precluded from opening Richards' default as a matter of law because a "showing . . . made under oath" is one of the four conditions precedent of opening a default under O.C.G.A. § 9-11-55(b), and such a showing had not been made by Richards at the time the trial court ruled on his motion to open the default. Because the trial court was precluded as a matter of law from opening Richards' default as to the Conventional Quiet Title Claim and the Declaratory Judgment Claim, it could not have abused its discretion in refusing to do so. Accordingly, Appellants' argument to that end should be rejected.

The trial court correctly found that the Appellants failed to set up a meritorious defense, as there is no meritorious defense. It is undisputed that the Appellants, and all Defendants, claims as to the Property are based entirely on the ARD referenced in the Petition as Exhibit "F". (R-87-90.) The ARD was not recorded in the chain of title preceding the Appellees' purchase of the Property. Additionally the restrictions and rights set out in the ARD expressly expired in December of 2016. These are facts that will ultimately defeat any claims by the Appellants or the remaining Defendants.

The law governing the "meritorious defense" requirement provides: "[i]n order to establish a meritorious defense, a defendant must demonstrate that the outcome of the case may be different if the motion is granted." Butterworth v. Safelite Glass Corp., 287 Ga. App. 848, 850 (2007). "But, in making that showing,

a defendant cannot rely on mere conclusions; he must set forth facts that establish the essential elements of a meritorious defense.” Id.; see also Tomsic v. Marriott Intern., Inc., 321 Ga. App. 374 (2013) (holding that affidavits attached to motion to open default were insufficient to establish meritorious defense because affidavits did not address defenses asserted by defaulting party.) In this case, Appellants’ Motion to Open Default sets forth what is insufficient as a matter of law to establish a meritorious defense—a mere conclusory statement that “Defendants filed a . . . verified Answer, raising defenses . . .” including the statute of frauds and failure to join indispensable parties. (R-190.) Further, the affidavits of Appellants’ counsel attached to the Motion to Open Default fail to provide any “facts” which establish the essential elements of a meritorious defense. (R-193-194.) Rather, those affidavits provide background on the purported reasons for Appellants’ late-filing of their answer and do not address any particular defense raised by Appellants. (Id.) Further, Appellants did not provide any additional evidence tending to establish a meritorious defense at the February 25, 2019 hearing. As a result, while their Answer may have alleged certain defenses, the Association, while in default, failed to establish a required “meritorious defense” and the trial court therefore did not abuse its discretion in refusing to open the Association’s default for that reason.

Relatedly, Appellants’ argue that “the trial court did not address each of the four prerequisites under O.C.G.A. [§] 9-11-55(b) in its Order.” (Appellants’ Brief at

18.) However, Appellants do not provide any legal support for their contention that a trial court *must* address each of those prerequisites in a written order denying a motion to open default or otherwise abuses its discretion. Rather, upon review of an order regarding a motion to open default, the trial court and this Court are required only to “determine whether all the conditions set forth in O.C.G.A. § 9-11-55 have been met” Flournoy v. Wells Fargo Bank, N.A., 289 Ga. App. 560, 563 (2008). Here, the trial court found that the Association failed to “set up a meritorious defense” regarding the Declaratory Judgment Claim. This was all that was required, as the Association’s failure to make such a showing prohibited the trial court from opening its default as a matter of law. For that same reason, the trial court did not “fail[] to consider the requirements for the proper case grounds” as Appellants argue, because the trial court could not consider whether a “proper case” existed in the absence of a meritorious defense by the Association. (Appellants’ Brief at 19.)

Next, as to the Court’s entry of the February 27 Order *nunc pro tunc* to February 25, 2019, Georgia law is clear that “the purpose of a nunc pro tunc entry is to record some previously unrecorded action actually taken or judgment actually rendered.” In re H.L.W., 244 Ga. App. 498, 498 (2000). Accordingly, Georgia trial courts may properly issue an order *nunc pro tunc* to “backdate” or cause a written judgment “to relate back to” a prior date “of something actually done” by the trial court. Maples v. Maples, 289 Ga. 560, 561 (2011); see also Paine v. Nations, 301

Ga. App. 97, 100 (2009) (“A court’s power to amend nunc pro tunc is the power . . . to reflect the truth of what happened”) (citations omitted); In re H.L.W., 244 Ga. App. 498, 498-499 (2000). As the record plainly reflects that the trial court announced its order on February 25th, the entry of a written order reflecting that announced ruling is proper under Georgia law.

III. The trial court’s holding regarding the declaratory judgment claim was not erroneous as Appellees’ pleading adequately alleged the existence of a justiciable controversy necessary for a declaratory judgment claim.

Appellants argue that Appellees pleading “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.” (Appellants’ Brief at 20-21.) As a result, Appellants contend that the trial court’s February 27 Order was in error because the “trial court was without jurisdiction” to issue a declaratory judgment. Such positions should be rejected.

There can be no dispute that Georgia superior courts are “authorized to enter a declaratory judgment upon petition therefore . . . to determine and settle by declaration any justiciable controversy of a civil nature” Baker v. City of Marietta, 271 Ga. 210, 213 (1999); see also O.C.G.A. § 9-4-2 *et seq.* Importantly, this Court and the Georgia Supreme Court have held that “[d]isputes concerning ownership of or right of access to land are classic candidates for resolution via declaratory judgment.” Quality Foods, Inc. v. Smithburg, 288 Ga. App. 47, 52

(2007) (holding that trial court properly denied summary judgment against counterclaim for declaratory judgment regarding claimed property interest); citing Smith v. Jones, 278 Ga. 661, 661 (2004) (citations omitted). However, despite Appellants' inference to the contrary, there is no magic pleading language which gives rise to a 'justiciable controversy.' Rather, as this Court recently reiterated, a "'justiciable controversy' . . . means there are *circumstances* showing a necessity for a determination of the dispute . . . to protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest" U-Haul Company of Arizona v. Rutland, 348 Ga. App. 738, 747 (2019) (emphasis supplied); citing Baker, 271 Ga. at 214. Put another way, "a justiciable controversy exists where a concrete issue is present, and there is a definite assertion of legal rights, and a positive legal duty with respect thereto, which are denied by the adverse party." GAPIII, Inc. v. Seal Industries, Inc., 338 Ga. App. 101, 110 (2016) (citation omitted).

In this matter, it is clear that the relevant circumstances, as alleged, give rise to a justiciable controversy regarding the parties' respective rights and interest in the Property ripe for determination by way of a declaratory judgment. There is no dispute that Mommies has owned the Property since March 2005. (R-149.) There is likewise no contest that FHP holds a first priority security interest in the Property.

(R-154.) Relatedly, the parties likewise do not dispute that the ARD, which is purportedly dated December 21, 2000, was not recorded until October 18, 2007, more than two years after Mommies took title to the Property. (R-149-150; Appellants' Brief at 20.) Despite such agreement, Appellants' pleading denies that Appellees are entitled to quiet title to the Property pursuant to O.C.G.A. §§ 23-3-40 and 23-3-60 *et seq.* and further denies that Appellees may alternatively seek a declaratory judgment from the trial court "regarding title to the Property and a determination regarding [Appellants'] rights in the Property." (R-157, R-160-161.) Notwithstanding those denials, however, Appellees' pleading clearly alleges a concrete issue regarding the parties' respective rights to the Property, asserts Appellees' own legal rights in the Property free and clear from those claimed by Appellants, which Appellants denied in turn. Under Georgia law, such allegations are sufficient to demonstrate circumstances evidencing a "justiciable controversy" regarding title to the Property ripe for determination by way of a declaratory judgment. Relatedly, such a showing belies Appellants' claim that the trial court erred and abused its discretion by refusing to Appellants' defense that Appellees' pleading failed to state a claim upon which relief can be granted due to the purported absence of allegations of a "justiciable controversy." (Appellants' Brief at 23.)

As a result of the foregoing, Appellants' argument that the trial court abused its discretion by granting a default judgment against the Association and Richards

as to Appellees' declaratory judgment claim "without sufficient information to do so" must be rejected. (Appellants' Brief at 20.) By way of such ruling, the trial court properly found that the ARD was recorded outside of Appellees' chain of title and that they did not have constructive or actual knowledge of the same at the time they took title to the Property, all of which is undisputed by the parties. (R-14-18.)

CONCLUSION

The trial court was within its authority to enter default judgment based on the untimely and inadequate pleadings of the Appellants. Perhaps most important is the fact that whether by default or adjudication on the merits of the case, the merits of the Appellants', and all Defendants', claims against the Property and the rights of the Appellees are governed by the ARD which was never binding upon the Appellees as they came in to title without notice as a matter of law, and which by its plain terms expired more than three years ago. Thus the outcome will be no different if the Appellants are permitted to litigate the case on the merits.

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

This 24th day of June, 2018.

WEISSMAN PC

/s/ JEFFREY H. SCHNEIDER

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

JOHN RICHARDS, et al.,

Appellants,

vs.

VINAY BOSE, et al.,

Appellees.

CASE NO. A19A2076

CERTIFICATION COMPLIANCE WITH RULE 2

The undersigned certifies that the foregoing Brief of Appellees is in compliance Rule 2, including the use of the Times Roman, 14-point font.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this date the Brief of Appellees was served upon counsel for Appellant by depositing a copy of same in the United States Mail, postage prepaid, and properly addressed as follows:

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