IN THE COURT OF APPEALS OF GEORGIA

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JOHN RICHARDS AND CHATTAHOOCHEE RIVER CLUB HOMEOWNERS ASSOCIATION, INC.,
Applicants,

-vs-

VINAY BOSE, MOMMIES PROPERTIES, LLC, FH PARTNERS LLC
Respondents.

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APPELLANT'S REPLY BRIEF

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APPEAL NO. A19A2076

FROM THE SUPERIOR COURT OF FORSYTH COUNTY
CASE NO. 18CV-1887-1

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TABLE OF AUTHORITIES FOR APPELLANTS' BRIEF

Cases

Statutes

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' REPLY BRIEF

COME NOW John Richards and Chattahoochee River Club Homeowners Association, Inc., Appellants herein, and show the Court as follows in reply[1]:

O.C.G.A. Section 9-11-15(a) provides that 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 and that includes an amendment of a pleading to include a verification.[2] On February 26, 2019, the date that the December 18, 2018 Answer

[1] In the interest of brevity, Appellants will focus in this brief only upon a few important points.

[2] Appellees contend at page 10 of their brief that the law requires that an 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. Appellees cite a 2000 Anti-SLAPP statute case, Davis v. Emmis Pub. Corp., 244 Ga. App. 795, 798, 536 S.E.2d 809 (2000), in support of that statement of law. As the Court is aware, the Anti-SLAPP statute in Georgia at that time contained an express

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

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 with an Amended Answer on February 26, 2019 before the trial court issued its Order on February 27, 2019. (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 with the Amended Answer on February 26, 2019 by granting his motion to open default as to Counts 3, 4, 5, 6, and 7 of the Complaint because, without a showing under oath as required by O.C.G.A. Section 9-11-

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provision requiring a specific verification be made by the plaintiff and also plaintiff's counsel and, providing further, that if such specific verification was not made within 10 days after the omission is called to the attention of the party asserting the claim, that the claim "shall" be stricken. Id. at 797-798. That is not an accurate statement of law as to this case which is not governed by the former Anti-SLAPP statute. As the Davis Court pointed out, the express language of the now former Anti-SLAPP statute with its strict verification requirements and time limit for verification stands in contrast to other code sections regarding late filing of verifications. Id. at 798.

55(b), the Court was without authority to grant his motion to open default. (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 Gov't, LLC v. Atlanta Dev. Authority, 303 Ga. App. 724, 734, 694 S.E.2d 680 (2010). It is not a proper use of the trial court's power to amend *nunc pro tunc* to prevent a party from filing a verification that the party is entitled to file as a matter of right under O.C.G.A. Section 9-11-15(a). That is what the trial court did here by entering its February 27, 2019 Order *nunc pro tunc* to February 25, 2019. There was no inadvertent error or omission that was corrected by making the Order effective the day before John Richards amended his Answer with his verification. An examination of the transcript further reveals no inadvertent error or omission corrected by the trial court's exercise of its *nunc pro tunc* power in its Order.

The conditions precedent of O.C.G.A. Section 9-11-55(b) require a showing under oath, the offer to plead immediately, an announcement of ready for trial and a meritorious defense. The showing under oath requirement is discussed above. There is no issue in the case regarding the offer to plead immediately since the Answer was filed on December 18, 2018 well before the cross motions and there is no issue regarding an announcement of ready for trial since a jury trial was requested in the Answer and an announcement made by counsel under oath in

connection with his affidavit in support of the motion to open default. (R-148-178 and R-195-196).

With respect to the condition precedent of a meritorious defense, the trial court focused in its Order only upon the defense of the failure to join necessary and indispensable parties. (R-14-18). While that makes sense with respect to the Quiet Title aspects of the case, it is not the whole picture with respect to the declaratory judgment claim. The trial court erred in not considering Appellants' other defenses. (R-14-18). The Answer additionally raised defenses of failure to state a claim upon which relief may be granted, statute of frauds and, in responding to some of the factual allegations, asserted further that Appellants' opinions and beliefs concerning use restrictions applicable to the subject property are based upon their understanding of the zoning restrictions. (R-148-178). Contrary to Appellees' contention, a verified Answer in which defenses are asserted meets the requirement of presenting a meritorious defense. La Mara X, Inc. v. Baden, 340 Ga. App. 592, 597, 798 S.E.2d 105 (2017).

Moreover, although Appellees contend that it is "undisputed" with respect to the declaratory judgment claim that Appellants' "claims to the Property are based entirely on the ARD" that is not true. Zoning restrictions impact the use of the subject property which in turn impacts this community. Zoning is referenced in the Answer as a basis for Appellants' understanding of the respective rights of the

parties. (R-148-178). Similarly, the subject property is adjacent to a national forest and there is an agreement filed of record with the U.S. government that provides for access to the subject property in connection with access to the national forest. That agreement was never mentioned by Appellees in the Complaint although it goes directly to the issues raised in the Declaratory Judgment claim and the Quiet Title claims. The zoning restrictions and the agreement with the U.S.A. bear upon the use of the subject property and access rights to the subject property respectively. A party is not required or expected to argue all of these points in an Answer to a Complaint under the Civil Practice Act.

The trial court acted improperly in granting the declaratory judgment without considering all of Appellants' defenses. Additionally, by issuing a declaratory judgment that is vague, ambiguous, erroneous, and that does not consider all defenses and the applicable zoning restrictions and title information, the trial court's Order will likely cause substantial error at trial, present the potential for inconsistent results and adversely impact the rights of Appellants at trial.[3]

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

[3] Default judgment is not favored in the law. Title issues should be based upon the strength of title and not default. See, Lord v. Holland, 282 Ga. 890 (2008).

Respectfully submitted, this 10th day of July, 2019.

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

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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:

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X depositing a copy in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to ensure delivery;

☐ via email.

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Dated this 10th day of July, 2019.

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