IN THE SUPERIOR COURT OF FORSYTH COUNTY

STATE OF GEORGIA

VINAY BOSE, MOMMIES PROPERTIES, LLC and FH PARTNERS, LLC, Plaintiffs, v. JOHN RICHARDS, CHATTAHOOCHEE RIVER CLUB HOMEOWNERS' ASSOCIATION, INC. and JOHN DOE and JANE DOE, Defendants.	Civil Action File No. 18-CV-1877-1

RESPONSE TO
MOTION TO OPEN DEFAULT

COME NOW Plaintiffs FH Partners, LLC, Vinay Bose and Mommies Properties, LLC and hereby submit their Response to Motion to Open Default, showing the Court the following:

Plaintiffs admit that they were aware of the default by Defendants and that they remained silent regarding same until after the time within which Defendants could cure as a matter of right had expired. It was incumbent on Defendants, and not Plaintiffs, to file appropriate pleadings in this Action and to do so within the time-frames provided by law. When Defendants stubbed their toes by failing to comply with the procedural obligations imposed by the Georgia Civil Practice Act, Plaintiffs naturally made the strategic decision of attempting to end this litigation before it takes on a life of its own.

While counsel for Plaintiffs takes no pleasure in taking Defendants and their counsel to task because of a procedural misstep, that particular error at least has provided Plaintiffs with an opportunity

to dispose of this matter in a summary fashion by getting the relevant issues before the Court early on in the process, especially under attendant facts and circumstances where the actions of Defendants prior to the filing of this Action were in bad faith and have caused Plaintiffs unnecessary trouble and expense, all as more particularly evidenced by Defendants' inability to provide any sort of meritorious defense whatsoever with respect to Plaintiffs petition to remove the cloud on their title caused by an Agreement Regarding Development that undisputedly is outside of Plaintiffs' chain of title.

Once in default, it is incumbent upon the party attempting to open the default to make a number of showings. Upon receiving Plaintiffs' Motion for Default Judgment, Defendants did some of what they should have done by filing a Motion to Open Default, paying costs and announcing that they were ready to proceed on the merits. Plaintiffs also concede that the filing of an Answer, albeit after the time within which it was due, can be argued, as it has been by Plaintiffs, to satisfy the requirement of offering to plead instanter. There are additional requirements that must be satisfied when seeking to open a default, however, and Defendants have failed to satisfy a number of them.

While Defendants have provided affidavits explaining how the default occurred, those affidavits actually confirm that no proper showing has been made that would authorize the opening of the default. The three grounds allowing a court to exercise its discretion in allowing the opening of default are (a) for providential cause which prevented filing of a plea; (b) for excusable neglect; or (c) where the Court determines that a proper cause has been made for default to be opened. O.C.G.A. § 9-11-55(b); Johnson v. American National Red Cross, 253 Ga. App. 587 (2002); C.W. Matthews Contracting Co. v. Walker, 197 Ga. App. 345, (1990).

The Affidavits submitted by Defendants show that neither of the first two grounds have been met, since both Clay Ratterree and Holly Humphries both confirm in their Affidavits merely that "...the answer was to go out that day..." and not that there was any recognition by either of them that the answer actually had to be filed on December 14, 2018 as a result of the agreed extension and corresponding Order. While Ratterree specified in his Affidavit that it did not occur to him that e-filing might not be available in Forsyth County, he did not offer any other explanation for why neither he, Humphries nor co-counsel Kimberly Cofer Butler contacted anyone on the Plaintiffs' side to explain their misunderstanding and asking for the indulgence of an additional extension through the following week within which to file their answer.[1] Moreover, while Ratterree and Butler may have known that the answer actually needed to be filed on December 14, 2018 – and not just served as Humphries did on their respective behalves – it is clear from the evidence that they did not make same known to Humphries and the end result was the failure to file a timely answer and, after such failure, the additional failure to open the default as a matter of right. Under those facts and circumstances, it cannot reasonable be argued by Defendants that there was providential cause or excusable neglect that kept Defendants from timely filing an answer.

Whether or not Defendants have made a "proper case" to open the default is, of course, within the sound discretion of the Court. Having said that, such consideration should not occur in a vacuum,

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[1]While Plaintiffs are not happy about having been forced to file the instant litigation to remove a problem that really should not even exist, they have extended every professional courtesy and been cooperative along the way, with the only exception to same being the filing of their request for a default judgment with the sole purpose of avoiding unnecessary trouble and expense for more than 620 affected individuals and entities, not to mention the prospect of avoiding a substantial waste of the Court's time and resources litigating something that should not even be in controversy in the first place.

but rather in the context of whether Defendants have met the other requirements for opening a default, including the most important one, which is asserting a meritorious defense.[2] If Defendants cannot show the Court that they have something more than their bare notice pleadings including general denials and alleging general defenses, there is no basis for the Court to open the default and Plaintiffs are entitled to the relief they are seeking, especially with respect to the clouds on their title.[3] Butterworth v. Safelite Glass Corporation, 287 Ga.App. 848 (2007).

Defendants are correct that generally, the opening of a default rests within the sound discretion of the trial court and that compliance with the four specified conditions, including the necessity of setting up a meritorious defense, are conditions precedent to the opening of a default. Id. Absent the showing of a meritorious defense, however, a trial court has no discretion to open a default. Id.; Forrister v. Manis Lumber Co., 232 Ga.App. 370 (1998); see also Global Assoc. v. Pan American Communications, 163 Ga.App. 274 (1982). Furthermore, the failure to make such a showing is, in and of itself, fatal to the motion to open default, such that no other condition need be considered by the trial court. Butterworth, 248 Ga.App. at 850.

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[2]While Plaintiffs recognize that Defendants' counsel find themselves in an uncomfortable position, whatever they failed to do in a timely manner actually has no bearing on the ultimate outcome of this litigation – all it has provided for both Plaintiffs and the Court is the ability to address the merits of Defendants' defense in a summary context, thus avoiding the involvement of hundreds of defendants, months of written discovery, document production and depositions, countless pleadings that are sure to be filed and the possibility of several weeks of trial, all to reach the inevitable conclusion that Plaintiffs and their property are not restricted as contended by Defendants.

[3]Plaintiffs' other claims do not involve everyone in the Chattahoochee River Club neighborhood and are only directed against those who have chose to become directly involved in interfering with Plaintiffs' property rights and who have specifically intended to interfere with their business operations and cause them harm for no good reason.

In order to establish a meritorious defense, a defendant must demonstrate that the outcome of the case may be different if the motion is granted, 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. While the affidavit offered in support of the motion to open default need not contain in great detail the factual basis of the proposed defense, an affidavit that is completely devoid of facts and details that would provide a defense to the action is not sufficient to allow the Court to exercise its discretion. Id. Defendants have alleged no facts that would lead to any conclusion other than that Plaintiffs' positions are legally accurate and Plaintiffs are entitled to the relief they are seeking.

In this action, Plaintiffs assert detailed verified facts that explain the issues that they are asking to be addressed and that support their request for relief that are more particularly set forth therein. Since Defendants failed to answer the Petition timely and are in default, it is incumbent upon them to provide the factual basis for the Court to determine that they have a meritorious defense, not just the general denials that are contained in the "twenty nine page answer" they filed in this Action and upon which they rely as their "offer to plead instanter". If the answer and other documents that Defendants have filed in support of their Motion do not provide a basis for the trial court to determine that a meritorious defense had been factually raised, the Court does not have the discretion to open the default and Plaintiffs are entitled to all of the relief they are seeking against Defendants, subject, of course, to an evidentiary hearing on damages. Id.

In support of their Motion, Defendants cited La Mara X, Inc. v. Baden, 340 Ga.App. 592 (2017) for the proposition that in order to assert a meritorious defense, a defendant need only show that it asserted defenses to the plaintiff's claims and they argue that because they have asserted some

defenses in their answer, they are golden. A more careful reading of La Mara, however, shows that it stands for the same proposition as Butterworth, which is that in order to create a situation where a trial court can even exercise its discretion, the "meritorious defense" element requires the assertion of the factual bases upon which the defendant challenges the plaintiff's claims. The defendant in La Mara, who was challenging a "slip and fall" claim, provided an affidavit in which it was averred that there was information that no customer had slipped and fallen at the restaurant and that there were numerous defenses to the plaintiff's claims, including that the defendant acted with reasonable and ordinary care, that it did not cause or contribute to the alleged injuries, that the decedent failed to exercise ordinary care, that the act that allegedly caused the decedent's death was unforeseeable, that the decedent voluntarily assumed the risk, and that there was no dangerous condition on the premises at the time. Id. Here, all that Defendants have done is file general denials of specific allegations and general defenses which speak for themselves and they have failed to assert any facts upon which the Court can rely to determine that Plaintiffs' property is bound by the agreements and restrictions that Plaintiffs are attempting to eliminate in the first place and which Defendants contend restrict Plaintiffs' property and limit and control their use thereof.[4]

In their Brief in Support, Defendants accurately state that the general policy of the law is for matters to be decided on their merits and the proposition that default is a drastic remedy that should

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[4]For example, while it is clear that Plaintiffs had no actual knowledge of the Agreement Regarding Development which was outside of the chain of title, Plaintiffs could be bound by such Agreement if they had actual knowledge of same and Defendants have made no evidentiary showing of any such knowledge on the part of Plaintiffs, or that could be imputed to Plaintiffs. In the absence of such evidence, there can be no merit to the defense.

only be allowed in extreme circumstances. Plaintiffs themselves embrace those principles and hold them dear and if there was an actual controversy here to be decided by a trier of fact, they would be more than content with allowing a full and fair hearing of all of the issues and letting the chips fall where they may. In circumstances such as are present here, however, when Defendants have done everything they can to interfere with Plaintiffs' legitimate business operations on their own property and when Defendants have done nothing to be cooperative and neighborly and have done their best to maximize the unnecessary trouble and expense the are imposing on Plaintiffs in hopes that Plaintiffs will capitulate, Plaintiffs will not apologize to anyone, including Defendants and their counsel, for trying to bring this matter to a close before it becomes a wasteful fiasco where only stubbornly litigious parties and their counsel stand to benefit from manufactured controversies that have been instigated by a handful of self-serving "neighborhood representatives" who care nothing about the collective interests of the others in their community and the exercise of valuable property rights by a fellow citizen. Defendants should be ashamed of themselves for the positions they have taken to date with respect to the issues that Plaintiffs have brought before the Court and Defendants' their legal error has given both Plaintiffs and the Court a fair opportunity to end the madness before it gets going good.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Open Default, enter a default judgment against Defendants and set this matter down for a hearing on the issue of damages.

Submitted as of February 7, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and correct copy of the within and foregoing **Response to Moton to Open Default** to all other counsel of record by statutory electronic service addressed as follows:

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So certified as of February 7, 2019.

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