MOTION PRACTICE IN GEORGIA

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MOTIONS

I. ELECTED MOTIONS MADE PRIOR TO TRIAL

A. MOTIONS TO OPEN DEFAULT

When a Defendant fails to file an answer in State or Superior Court within thirty (30) days of service of the Complaint upon it as provided by O.C.G.A. § 9-11-12 and presuming that the time period for filing the answer has not been extended by Court order, by stipulation of the parties or as otherwise provided by law, it automatically goes into default. O.C.G.A. §§ 9-11-12(a) and 9-11-55. Pursuant to O.C.G.A. § 9-11-55(a), a Defendant can reopen default as a matter of right by the filing its defensive pleadings and answer within fifteen days of going into default along with the payment of costs. O.C.G.A. § 9-11-55(a). The right to open default within fifteen days upon payment of costs is absolute. Any judgment entered by the Court within 45 days of the service of the Complaint on the Defendant is premature. As such, any judgment entered during this period must be set aside upon filing of an appropriate motion and the payment of costs within the fifteen (15) day grace period provided by O.C.G.A. § 9-11-55(a). See *Parker v. Branan*, 108 Ga. App. 229, 132 S.E.2d 556 (1963). At any time before entry of final judgment, the Court, in its discretion and upon payment of costs, may allow a default to be opened.

Pursuant to O.C.G.A. § 9-11-55(b) and before judgment is entered, the Court can open default on one of three grounds if four conditions are also met. The three grounds for opening default are: (1) providential cause, (2) excusable neglect (as distinguished from willful disregard of the process of the court), and (3) where the judge from all the facts shall determine that a proper case has been made for the default to be opened. However, before the Court can reopen default based on one of these three grounds, four conditions must be satisfied by the movant. These four conditions are: (1) that the Defendant must make a showing under oath that default should be

opened, (2) that the Defendant must show a meritorious defense(s) to claims set forth in Plaintiff's Complaint, (3) the Defendant must offer to plead instanter, and (4) the Defendant must announce ready to proceed with trial. See *C.W. Matthews Contracting Co. v. Walker*, 197 Ga. App. 345, 398 S.E.2d 297 (1990). Essentially, to open a default judgment, a Defendant must file a motion to open default based on one of the three grounds listed above. The motion must set out, under oath, a meritorious defense to the Complaint, a legal excuse for late filing, and payment of costs. *Gowdey v. Rem Assoc.*, 176 Ga. App. 83, 335 S.E.2d 309 (1985).

Although there is no set time period for filing a motion to open default, the Court of Appeals held in *Evers v. Money Masters, Inc.*, that the trial court did not err in refusing to open default where the defendant waited more than four months after the answer was due to file its motion to open default. See *Evers v. Money Masters, Inc.*, 203 Ga. App. 546, 417 S.E.2d 160 (1992).

While O.C.G.A. § 9-11-55 does not specifically require that a hearing must be held on motions to reopen default, the language contained in this code section suggests that a hearing is contemplated. *Livesay v. King*, 129 Ga. App. 751, 201 S.E.2d 178 (1973).

It should be noted that other than the fifteen (15) day grace period provided by O.C.G.A. § 9-11-55(a), the Court is not required to grant motions to open default. It is an extremely dangerous undertaking to rely on the Court to allow default to be opened after failing to file a timely answer.

B. MOTIONS FOR SUMMARY JUDGMENT

O.C.G.A. § 9-11-56 provides the means of seeking summary adjudication of the merits of a lawsuit through the filing of a motion for summary judgment. Although motions for summary judgment are most often filed by Defendants in lawsuits, its provisions are generally available to all parties. Essentially, a party files a motion for in an effort to have the Court decide all or part of a dispute without the use of a jury. It is applicable to any claim in an action, including third party

complaints, counterclaims, cross claims, intervention and interpleader. O.C.G.A. § 9-11-56.

Generally, in order to prevail on a motion for summary judgment, the moving party must establish that there is no genuine issue of material fact with respect to the claims or defenses asserted and that as a result, the moving party is entitled to judgment in his/her/its favor. Normally, negligence cases are not subject to summary adjudication; however, a Defendant can be entitled to summary judgment if it can establish that the Plaintiff is unable to provide sufficient evidence to support at least one essential element of its cause of action. See Lau's Corp. v. Haskins, 261 Ga. App. 491, 491, 405 S.E.2d 474, 476 (1991). If the Plaintiff is unable to present evidence sufficient to support a prima facie case against the Defendant, summary judgment should be entered against him.

It should be noted that motions for summary judgment are motions to determine the merits of a claim or defense. As such, an order granting such a motion often constitutes a final judgment on the merits of the claim. As such, an order granting a motion for summary judgment is subject to all of the rules of res judicata, collateral estoppel, and appeal. When denied, the motion does not result in any prejudice to a litigant's legal or factual position at trial. Instead, the Court has essentially determined that there exists at least one factual dispute of a material nature that must be decided by a jury. It should be noted that the Court is not required to issue an order disposing of all causes of action raised by the Plaintiff. The Court is afforded discretion to grant partial summary judgment on limited causes of action or other issues to the extent there is no genuine dispute as to pertinent facts.

There is no absolute formula for determining whether to move for summary judgment, but in considering whether to file the motion, a party should consider the following questions:

Do the uncontested facts favor the moving party?

Do the uncontested facts remove at least one essential element of the opposing party's cause of action or defense?

Are the material facts in the case truly uncontested or un-rebutted?

Is proceeding with trial more advantageous to the movant than filing a motion for summary judgment?

Is the motion based on well settled law or is it based on an extension of existing case law?

Is the presiding judge known to consider and grant motions for summary judgment or does he/she prefer to deny such motions and allow Plaintiff to proceed with trial?

Will a jury be impaneled to decide the case or will the dispute be decided as part of a bench trial?

Will the passing of time improve or detract from the asserted claim or defense?

What is the likely result of the motion?

What effect will the Court's ruling have on the case?

Will the motion narrow the issues for the jury to consider and/or prevent confusing the issues for the jury?

Does it appear that the Plaintiff has sufficient facts to carry its burden of proof in response to motion as contemplated by Lau's Corp v. Haskins. Id.

With respect to defending parties, a party against whom a claim, counterclaim or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment. O.C.G.A. §9-11-56(b). Under subsection (c) of this code section, the motion shall be served at least thirty days before the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. Judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law. O.C.G.A. § 9-11-56; Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

It should be noted that summary judgment can be entered on the issue of liability alone. In some circumstances, summary judgment can be entered in the Plaintiff's favor on the issue of liability even though a genuine issue of material fact may remain with respect to damages. If the Court only grants partial summary judgment, it will normally indicate in its order what material facts remain to be determined by a jury. O.C.G.A. §9-11-56(d).

Typically, a motion for summary judgment will be based not only on the allegations made in Plaintiff's Complaint but also on sworn testimony contained within depositions and/or affidavits. With respect to affidavits, they should be made on personal knowledge of the affiant, shall set forth such facts as would be admissible as evidence and shall show affirmatively that the affiant is competent to testify about the matters addressed in the affidavit. See O.C.G.A. §9-11-56(e). When a motion for summary judgment is made and supported by affidavits and or deposition testimony, an adverse party may not rely upon the allegations or denials of his pleadings. Instead, the Plaintiff must provide evidence that creates at least a prima facie case. In other words, the Plaintiff must provide evidence that reflects a genuine issue of material fact which must be decided by a jury. See Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

II. MOTIONS MADE AT TRIAL

A. MOTIONS IN LIMINE

Generally, motions in limine are utilized to prevent introduction of inadmissible evidence to a jury. Although an objection can be raised at trial to improper evidence, it is virtually impossible to "un-ring the bell" and prevent a jury from not considering any evidence (proper or improper) that they have heard during a trial. The Supreme Court of Georgia has held that the purpose of filing a motion in limine is to prevent the asking of prejudicial questions and the making of prejudicial

statements in the presence of the jury. See *Harley Davidson Motor Co. v. Daniel*, 244 Ga. 284, 260 S.E.2d 20 (1979). Motions in limine are also made when a party seeks a ruling on the admissibility of certain evidence prior to commencement of trial. Generally speaking, motions in limine are preferred when the opposing party is likely to attempt to tender a piece of non-admissible evidence before a jury that would be extremely prejudicial to the defense of the case.

Motions in limine may be made in writing or orally before the Court. Additionally, since motions in limine are made just before or during trial, they are not generally subject to the rules that normally give a respondent a set period of time to respond to the motion. However, the trial Court has a great deal of discretion in determining how and when motions in limine will be filed and the response. Frequently, the trial court will include as part of a consolidated pretrial order or as part of a separate scheduling order, deadlines for filing and responding to motions in limine. However, one must be conscious of the pre-trial order entered in his or her case as there. One should be cautious if contemplating these motions and state in their portion of the pretrial order that the parties specifically reserve the right to make motions in limine and any other motion more properly addressed at the time of trial. *Reno v. Reno*, 249 Ga. 855, 295 S.E.2d 94 (1982); *Vickery v. PPG Industries, Inc.*, 210 Ga. App. 339, 436 S.E.2d 68 (1993); *Walton v. Datry*, 185 Ga. App. 88, 363 S.E.2d 295 (1987).

B. MOTIONS FOR CONTINUANCE

Motions for continuance are normally made prior to trial or when the case is called for trial. Continuances are addressed in considerable detail in O.C.G.A. §9-10-150 through §9-10-169. The most common grounds for these motions are the absence of lead counsel (O.C.G.A. §9-10-155); absence of a party because of illness or other good cause shown (O.C.G.A. §9-10-154); and absence of a material witness (O.C.G.A. §9-10-160).

With respect to the absence of a material witness, there are eight (8) elements that must be established in order for a continuance to be granted. They are: (1) that the witness is absent; (2) that he or she has been subpoenaed; (3) that he or she does not reside outside of the state; (4) that his or her testimony is material; (5) that the witness is not absent by the permission, directly or indirectly of the party requesting a continuance; (6) that the party seeking the continuance expects he will be able to procure the testimony of the witness at the next term of the Court; (7) that the motion is not made for the purpose of delay, but to enable the party to procure the testimony of the absent witness; and (8) the facts expected to be proved by the absent witness. Significantly, O.C.G.A. §9-10-161 provides that no continuance shall be allowed based on the absence of a witness or for the purpose of procuring testimony when the opposite party is willing to admit and does not contest the truth of the facts expected to be proved by that absent witness.

Finally, a party may move for a postponement or continuance based on surprise. If the plaintiff were to file an amendment to his complaint at the eleventh hour or when the case was called (example, amend complaint to seek punitive damages), the opposing party could seek a continuance under O.C.G.A. §9-10-158. The section provides that when a pleading is amended, if the opposite party states that he is surprised and not fully prepared for trial because of the amendment, upon a showing of the manner of unpreparedness and that surprise is not claimed for the purpose of delay, the case may be continued with the continuance charged to the party amending their pleadings. This section of the Code is very particular and your counsel must carefully comply with its terms. A failure to state, for example, that delay was not the purpose of the motion was held to be a proper ground for the Court to deny a motion for continuance. See *Abdill v. Barden*, 221 Ga. 591, 146 S.E.2d 199 (1965).

Likewise, a situation that could give rise to a motion for continuance would be an attempt by a party to call a witness who had not been identified in response to written discovery. In *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966), it was held that those witnesses should be permitted to testify but the surprised party should be given a postponement for a sufficient length of time to enable them to interview the witnesses, check the facts to which they would testify, and if indicated, arrange to secure rebuttal evidence or evidence for impeachment purposes.

The Court has discretion in deciding whether to allow a party to introduce testimony of a witness not named in the pretrial order. *Nease v. Bulvas*, 198 Ga. App. 302, 401 S.E.2d 320 (1991). It has been held not to be an abuse of discretion to prohibit a witness' testimony during a party's case-in-chief who was not named in the pretrial order. *Bryant v. Carver State Bank*, 207 Ga. App. 659, 428 S.E.2d 621 (1993) (cert. denied). Conversely, it has been held not to be error to allow a witness who is not listed in the pretrial order to be called in rebuttal, for the reason that the rebuttal witness may not be necessary except to respond to an issue raised by an opposing party. *Canada West v. City of Atlanta*, 169 Ga. App. 907, 315 S.E.2d 442 (1984) (cert. denied). However, the Court in *Canada West* stated that the procedure discussed in the *Nathan* case above should be followed also when allowing the testimony of a rebuttal witness not listed in the pretrial order.

C. MOTIONS FOR SEQUESTRATION

In most cases, either party shall have the right to have the witnesses of the other party examined out of the hearing of each other. O.C.G.A. §24-9-61. An exception is set out in O.C.G.A. §24-9-61.1 which provides that the victim of a criminal offense may be entitled to be present.

If the rule of sequestration is invoked, the Court is not required to enforce the rule until the presentation of evidence. *Blankenship v. State*, 258 Ga. 43, 365 S.E.2d 265 (1988). "The rule" is often invoked before opening statements are presented, so the trial judge presumably has discretion

to sequester witnesses at that time. See *Hughes v. State*, 128 Ga. 19, 57 S.E. 236 (1907). In the *Hughes* case, it was held that the trial judge properly exercised his discretion not to sequester witnesses during opening statements.

While the rule is most commonly invoked at the beginning of trial, it can be invoked later. In particular, a plaintiff can present his witnesses without the rule being invoked and upon resting, move the Court to sequester the defendant's witnesses. *Blitch-Everett Co. v. Jackson*, 29 Ga. App. 440, 116 S.E. 47 (1923).

Importantly, Georgia law provides that witness sequestration is mandatory when timely requested by any party. The refusal of the trial judge to grant the request is error and requires a new trial, irrespective of whether harm can be shown. *Poultry Land, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946). More importantly, the judge does have broad discretion, however, to make exceptions and to allow witnesses to remain in the courtroom. This decision to make or not to make an exception will not be reversed unless the objecting party can establish that the ruling constituted an abuse of discretion. *Horton v. Wayne County*, 243 Ga. 789, 256 S.E.2d 775 (1979).

When a witness violates an order of sequestration, there is doubt as to whether in a civil case, a party's witnesses can be prohibited from testifying. There is case law that holds that the witnesses must be allowed to testify. *Bean v. Landers*, 215 Ga. App. 366, 450 S.E.2d 699 (1994) (cert. denied). However, there are other cases holding that although a witness who has not complied with an order of sequestration is not rendered incompetent to testify, trial counsel my have waived the right to call that witness. *Star Jewelers, Inc. v. Durham*, 147 Ga. App. 68, 248 S.E.2d 51 (1978) (cert. denied). As a practical matter, most judges will not allow a witness who violates a motion to invoke sequestration to testify at trial.

Even the plaintiff may be sequestered if he elects to call his own witnesses before testifying

himself. The trial court has broad discretion to require that the plaintiff either testify first or be excluded from the courtroom until he testifies. *Barber v. Barber*, 257 Ga. 488, 360 S.E.2d 574 (1987). However, the Court also has discretion to allow co-plaintiffs to hear each other's testimony, at least in the absence of a showing of harm from the Court's failure to sequester him. *Sun v. Bush*, 179 Ga. App. 80, 345 S.E.2d 85 (1986).

D. MOTIONS FOR MISTRIAL

This motion is appropriate where counsel makes statements of prejudicial matters which are not in evidence, before the jury. O.C.G.A. §9-10-185 and §9-11-46(b). It is also error for any judge, during the progress of any case or in his instructions to the jury, to express his opinion as to what has or has not been proved. O.C.G.A. §9-10-7. Motions for mistrial will be granted only if doing so, is essential to the preservation of the right to a fair trial. *Sturdy v. State*, 192 Ga. App. 71, 383 S.E.2d 632 (1989). The grant of a mistrial is a last resort in the eyes of both trial and appellate judges. As mistrials are not a favored remedy, trial judges have broad discretion in their ruling, and their discretion will not be disturbed on appeal unless manifestly abused. *Wilkes v. Dept. of Transportation*, 176 Ga. App. 739, 337 S.E.2d 404 (1985).

Less drastic relief is normally called for when counsel makes statements on prejudicial matters, not in evidence. Under O.C.G.A. §9-10-185, the Court should prevent such statements and on objection, should rebuke counsel and give curative instructions to the jury. *City Council v. Lee*, 153 Ga. App. 94, 264 S.E.2d 683 (1980) (evidence of liability insurance).

It goes without saying that a motion for mistrial must be raised in a timely manner or it is deemed waived. *Berman v. State*, 191 Ga. App. 231, 381 S.E.2d 316 (1989). When improper evidence is at issue, the motion should be made immediately after the prejudicial evidence has been tendered at trial. *Giddens v. State*, 190 Ga. App. 723, 380 S.E.2d 274 (1989). Motions for mistrial

based upon improper evidence are considered waived when not made until the evidence is closed. *Garner v. State*, 174 Ga. App. 628, 330 S.E.2d 750 (1985). When making such a motion, the emphasis should be a fair trial. In other words, the client/party cannot get a fair trial if the mistrial is not granted and no amount of curative instructions will provide a fair trial. If the motion is denied, opposing counsel must decide whether to take the next step--requesting that the Court rebuke opposing counsel and give curative instructions to the jury if the Court does not do so on its own. Failure of the Court to rebuke counsel and give curative instructions may not provide a ground for appeal unless counsel asks the Court to take that action after the motion for mistrial is denied. *Tuggle v. State*, 211 Ga. App. 854, 440 S.E.2d 740 (1994).

E. MOTIONS FOR DIRECTED VERDICT, MOTIONS TO DISMISS AND MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A motion for directed verdict may be made at the close of the evidence offered by either party and/or at the close of all the evidence. A directed verdict is proper when there is no conflict in the evidence as to any material issue and that the moving party is entitled to judgment in its favor as a result. O.C.G.A. §9-11-50(a). In a non-jury case, after the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence, may move for dismissal on the ground that upon the facts and the law, the plaintiff has not presented evidence sufficient to support a prima facie case. The Court may then determine the facts and render judgement against the plaintiff or may decline to render any judgment until the close of all the evidence. O.C.G.A. §9-11-41(b).

A motion for directed verdict is a condition precedent to a motion for judgment notwithstanding the verdict. O.C.G.A. §9-11-50(b). Whenever a motion for directed verdict made at the close of the evidence is denied, not later than thirty days after entry of judgment, the party who

moved for directed verdict then may move to have the verdict and any judgment entered set aside and to have judgment entered in accordance with his motion for a directed verdict. O.C.G.A. §9-11-50(b).

F. MOTIONS TO REOPEN

Trial judges have broad discretion in deciding whether to allow a party to reopen a party's case in chief to present further evidence. Motions to reopen can be used to introduce any type of evidence, rebuttal or otherwise. There are contrary holdings in this area of law, for example, in *Polyloom Corp. v. Varsity Carpet Service, Inc.*, 175 Ga. App. 806, 334 S.E.2d 386 (1985), the Court held that it was not error to disallow additional evidence that was available at the time of trial but was not introduced due to mistake or trial strategy. However, in another case, *Able-Craft, Inc. v. Bradshaw*, 167 Ga. App. 725, 307 S.E.2d 671 (1983), it was held that the trial court may in its discretion permit the plaintiff to reopen his case in chief and offer some neglected evidence.

With regard to timing, a party can move to reopen the evidence at any time prior to the jury's announcement of a verdict. Although not as part of a holding, the Court of Appeals has stated that it is not necessarily too late after the case has been submitted to the jury for the opposing party to cure any defects in proof by having the moving party's case in chief reopened. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975). The Court of Appeals has indicated that a motion to reopen should be granted when the plaintiff will otherwise be subjected to a directed verdict because he has neglected to tender evidence material to his case, See *Able-Craft, Inc. v. Bradshaw* supra. There are, however, contrary holdings and one should not depend on these motions except in extreme circumstances.. *See Pickelseimer v. Traditional Builders, Inc.*, 183 Ga. App. 709, 359 S.E.2d 719 (1987).

III. CONCLUSION

In summary, there is a myriad of available motions in Georgia that be used as effective tools to guide a case toward a successful conclusion. By judicious use of these various motions, a party can limit or eliminate the issues to be heard by a jury, can limit what evidence a jury can hear and can possibly conclude a case on directed verdict where the Plaintiff has failed to provide evidence in support of a claimed cause of action or issue. In some cases, a matter can be concluded early without the need for a jury and with minimal expense. As such, motion practice is essential to any successful litigation strategy.