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Georgia Supreme Court Limits Attorneys' Fees Recoverable by Landlords

On October 29, 2007, the Georgia Supreme Court held that a Georgia statute establishes the amount of attorneys' fees a landlord may collect in an action against a tenant as a fixed percentage of back rent owed. In many instances, this maximum sum recoverable will be less than the amount incurred. Specifically, the Court held that O.C.G.A. § 13-1-11 applies to leases, as well as to promissory notes, and limits the recovery of attorneys' fees and costs "where the landlord under a commercial lease agreement filed suit against a tenant seeking the collection of past due rent as well as a declaration of other contractual rights of the parties—and, therefore, precludes an award of full attorneys' fees and costs as provided in the lease agreement." *RadioShack Corporation v. Cascade Crossing II, LLC*, 2007 WL 3129954, *1, *5 (Ga. October 29, 2007) (quoting *Cascade Crossing II, LLC v. RadioShack Corp.*, 480 F.3d 1228, 1232 (11th Cir. 2007)).

Section 13-1-11 governs "[o]bligations to pay attorneys' fees upon any note or other evidence of indebtedness." The statute provides that an obligation contained in a note or other evidence of indebtedness to pay attorneys' fees is enforceable if the sums due thereunder are collected by or through an attorney, subject to the following limitations: (i) if the instrument "provides for attorneys' fees in some specific percent of the principal and interest owing thereon," the obligation to pay attorneys' fees is limited to 15 percent of the principal and interest owing on the instrument, O.C.G.A. § 13-1-11(a)(1); and (ii) if the instrument provides for the payment of "reasonable attorneys' fees" but does not specify "any specific percent, such provision shall be construed to mean 15 percent of the first \$500.00 of principal and interest owing on such note or other evidence of indebtedness and 10 percent of the amount of principal and interest owing thereon in excess of \$500.00," O.C.G.A. § 13-1-11(a)(2). Finally, the statute imposes certain notice requirements that must be met before the obligation to pay attorneys' fees is enforceable. O.C.G.A. § 13-1-11(a)(3).

The lease in *Cascade* provided for the prevailing party to receive reimbursement from the non-prevailing party of its "reasonable" attorneys' fees. The landlord brought suit against the tenant to collect back rent totaling \$172,039.00 and sought declaratory judgment concerning the enforceability of an exclusive use provision in favor of the tenant being sued. The case was complex, and the landlord incurred fees totaling \$280,000.00. The Georgia Supreme Court addressed the following issue: "Whether O.C.G.A. § 13-1-11 applies to and limits the award of attorneys' fees and costs in this particular case—where the landlord under a commercial lease agreement filed suit against a tenant seeking the collection of past due rent as well as a declaration of other contractual rights of the parties—and, therefore, precludes an award of full attorneys' fees and costs as provided in the lease agreement." *RadioShack*, 2007 WL 3129954 at *5 (quoting *Cascade Crossing*, 480 F.3d at 1232).

On October 29, 2007, a divided Georgia Supreme Court answered this question in the affirmative. Relying on decisions of the Georgia Court of Appeals, and on the Georgia General Assembly's failure to amend the statute following those decisions, the majority concluded that O.C.G.A. § 13-1-11 applies to commercial leases. The Court explained that the use of the phrase "evidence of indebtedness" "has a broader meaning than the term 'note,'" *RadioShack*, 2007 WL 3129954 at *4, and held the term "'evidence of indebtedness,' as used in O.C.G.A. § 13-1-11, has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Id.* at *5.

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The dissent noted that the Georgia Supreme Court had “never decided whether a commercial lease constitutes an ‘evidence of indebtedness’ under O.C.G.A. § 13-1-11” and argued that the majority was mistaken in relying on the Court of Appeals incorrect interpretation of the statute. *RadioShack*, 2007 WL 3129954 at *7, *6 (Sears, J. dissenting). Justice Leah Ward Sears argued that the majority placed too much weight on the Georgia General Assembly’s silence. *Id.* at *7. The dissent examined the plain language of the statute and concluded that the statute “was never intended to include routine lease agreements.” *Id.* at *8-*9.

In *RadioShack*, the Georgia Supreme Court concluded that the statute applied “even though Cascade also sought a declaration of contractual rights, and RadioShack is continuing to possess and pay rent for the leased property.” 2007 WL 3129954 at *5. The Court explained that [t]he statute applies at least where, as here, past due rent is recovered, and the only other relief is declaratory and governs the future enforceability or amount of the tenant’s rent obligation.” *Id.*

This case provides certainty as to the following:

1. Confirmation that the terms of O.C.G.A. § 13-1-11 do apply to leases as well as to promissory notes and other evidences of indebtedness.
2. In the event that a legal action is brought to collect past due rent and pursue other relief such as a declaratory judgment, and the lease provides either for the payment of attorneys’ fees in an amount equal to a specific percentage of the amount collected or for “reasonable” attorneys’ fees, then the limitations on the amount of attorneys’ fees provided by § 13-1-11 will apply as to the entire proceeding.

This may create problems for a landlord seeking reimbursement of all of its attorneys’ fees in a case in which rent is collected, but other complex issues are also adjudicated. In these cases, the attorneys’ fees incurred in litigating the complicated non-rent issues may exceed the limitations of § 13-1-11 computed based on the rent collected. In cases such as these, the *RadioShack* decision leaves open a number of questions including the following:

1. Can a landlord seek to avoid the results of the *RadioShack* case by bifurcating the attorneys’ fees provision contained in the lease so as to provide for the payment of attorneys’ fees equal to a stated percent or in a “reasonable” amount as to the collection of rent and provide for the payment of actual attorneys’ fees or prevailing party attorneys’ fees as to any action not involving the collection of rent?
2. If a lease contains a single attorneys’ fees provision, can the landlord avoid the results of the *RadioShack* decision by bringing two separate actions – one action for collection of rent that would be subject to the limitations of O.C.G.A. § 13-1-11, and a separate action seeking declaratory judgment or the other desired relief which would not be subject to the terms of the *RadioShack* decision?



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