

**COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR APPLICATIONS**

May 4, 2015

To: Ms. Janette Bowen, 4030 Weelaunee Boulevard, Ellenwood, Georgia 30294
Docket Number: **Style:** **Janette Bowen v. Magistrate Judge Gary J. LeShaw, et al.**

Your document(s) is (are) being returned for the following reason(s).

1. Your Application was not accompanied by the statutory filing fee, \$300.00 civil; \$80.00 criminal, or a sufficient pauper's affidavit. OCGA §5-6-4 and Rule 5 Please be advised that your pauper's affidavit should be notarized by a notary public.
2. Portions of the record included were not tabbed and indexed. Rules 30 (e) and 31 (c).
3. **A stamped "filed" copy of the trial court's order to be appealed was not attached to your Application. Rules 30 (b) and 31 (e)**
4. A stamped "filed" copy of the Certificate of Immediate Review was not attached to your Interlocutory Application. Rule 30(b)
5. Your document(s) was (were) not signed by counsel (No signatures with expressed permission are permitted). Rule 1 (a)
6. There were an insufficient number of copies of your document. Rule 6
7. No Certificate of Service accompanied your document(s). Rule 6 You should provide a copy of your filing to the District Attorney and include his/her name and address on your Certificate of Service.
8. Your Certificate of Service did not include the complete name and /or mailing address of each opposing counsel and pro se party. Rule 1(a) and 6
9. Your document exceeds page limits. Rules 24(f) , 30(e) and 31(c)
10. Your request for court action must be submitted in motion form. Rule 41 (a)
11. No extension of time for filing an interlocutory application will be granted . Rule 30 (g) . No extension of time will be granted for filing a discretionary application unless the motion for extension is filed on or before the due date of the discretionary application.
12. The type font was smaller than 10 characters per inch; type was not double-spaced or/and type was on both sides of the paper. Rules 1(c), 24(b), 37(a) and 41(b).
13. Your motions were submitted in an improper form (joint, compound, or alternative motions in one document). Rule 41 (b)
14. Margins were too small or paper size was incorrect. Rules 1(c), 24(c), 30(e), 31(c) and 41(b).
15. Your document was submitted for filing more than 30 days after the date of the order granting, denying or dismissing the application or the order granting, denying or dismissing the Motion for Reconsideration. Rules 30(j) and 31(j).
16. **Other:**

For Additional information, please go to the Court's website at: www.gaappeals.us

Receipt No. 1130

COURT OF APPEALS
17 Trinity Avenue, S.W.
Atlanta, GA 30331
(404) 466-0450

DATE: 4/13/80

RECEIVED OF: [Handwritten Name]

WE ACKNOWLEDGE RECEIPT OF THE FOLLOWING:

BRIEF OF APPELLANT

ENUMERATION OF ERRORS

WITHDRAWAL FEE

PHOTOCOPIES

ADMISSION FEE

CERTIFICATION FEE

APPLICATION COST

OTHER

CASE NUMBER

[Handwritten Case Number]

[Handwritten Name]

[Handwritten Name]

300.00

AMOUNT \$

CASH

[Handwritten Signature]

CLERK

[Handwritten Name]

V

COURT OF APPEALS
47 TRINITY AVE SW
SUITE 501
ATLANTA, GA 30334-9006

SEE REVERSE SIDE FOR OPENING INSTRUCTIONS

432010000002

JANETTE BOWEN
4030 WELLAUNEE ROAD
ELLENWOOD, GA 30294

REMOVE EDGES 1, 2, & 3



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AGENCY 43200
BANK 1300-5000
MAG NO. 0000005196
FORM 001 OF 001

2

43201000002





Court of Appeals

Memorandum

To: Linda Lockette

From: Steve Castlen *SC*

Subject: Check Reimbursement Request

Date: May 4, 2015

We are returning Ms. Janette Bowen's filing to her due to a problem with her application. Ms. Bowen paid the \$300.00 filing fee in cash, per the enclosed receipt no. 113075. Please process a check for reimbursement of the filing fee and return the check to me so that I may send the check with Ms. Bowen's correspondence to her.

Thank you.

/ld

Attachments

Receipt No. 13-17-0

COURT OF APPEALS
47 North Avenue, S.W.
Suite 901
Atlanta, GA 30304
(404) 656-3156

DATE 11/26/13

RECEIVED OF AMERICAN

WE ACKNOWLEDGE RECEIPT OF THE FOLLOWING:

BRIEF OF APPELLANT _____

ENUMERATION OF ERRORS _____

WITHDRAWAL FEE _____

PHOTOCOPIES _____

ADMISSION FEE _____

CERTIFICATION FEE _____

APPLICATION COST _____

OTHER AMOUNT TO PAYOUT

CASE NUMBER 13-100000000-100000000

AMOUNT \$ 300.00

CASH

AMP

CLERK

AMOUNT TO PAYOUT
13-100000000-100000000

APPEAL NO.

IN THE COURT OF APPEALS

STATE OF GEORGIA

JANETTE BOWEN,

Petitioner/Appellant,

Versus

MAGISTRATE JUDGE GARY J. LESHAW

and

COLFIN AI GA I, LLC

Respondants/Appellees.

FILED IN OFFICE

APR 30 2015

CLERK COURT OF
APPEALS OF GEORGIA

CLERK COURT OF APPEALS OF GA

2015 APR 30 PM 2:16

RECEIVED IN OFFICE

ON APPEAL FROM THE DEKALB COUNTY SUPERIOR COURT
CIVIL ACTION FILE NO. 14-CV-6777-1

BRIEF IN SUPPORT OF APPLICATION FOR
DISCRETIONARY APPEAL

Janette Bowen

Janette Bowen,
4030 Weelaunee Road
Ellenwood, GA 30294
404-243-9441

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

JANETTE BOWEN,

Appellant,

vs.

MAGISTRATE JUDGE
GARY J. LESHAW,
AND
COLFIN AI GA I, LLC,

Appellees.

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Appeal Case
No.

APPLICATION FOR DISCRETIONARY APPEAL

Pursuant to O.C.G.A. § 5-6-35(a)(11), Appellant seeks the permission of this Court to appeal the April 23, 2015 Order of the Superior Court of DeKalb County, Georgia, (1) dismissing Appellant’s Petition for Writ of Certiorari. The sole errors to be enumerated on appeal are:

- (1) the trial court erred by denying Appellant’s Motion to Dismiss or, in the alternative, Appellant’s true amount of rent to be paid into registry;
- (2) the trial court erred by not following Writ of Certiorari procedures ; and
- (3) the trial court erred by issuing a writ of possession in favor of the Appellee.

The Court of Appeals of Georgia has proper jurisdiction over this matter as this is an appeal from the final judgment of a Georgia Superior Court reviewing a decision of a magistrate court in a *de novo* proceeding, and it does not fall within any area designated to be heard before the Supreme Court of Georgia under Article VI, Section VI, Paragraph III of the Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Court under the provisions of Article VI, Section V, Paragraph III of the Georgia Constitution of 1983.

Submitted this 30th day of April, 2015.



Janette Bowen,
4030 Weelaunee Road
Ellenwood, GA 30294
404-243-9441

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

JANETTE BOWEN,

Appellant,

vs.

MAGISTRATE JUDGE
GARY J. LESHAW,
AND
COLFIN AI GA I, LLC,

Appellees.

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Appeal Case
No.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On August 14, 2008, Appellant Janette Bowen, executed and delivered a Promissory Note (“Note”) to LEND AMERICA to finance the purchase of a single-family residence at 4030 Weelaunee Road, Ellenwood, GA 30294 (the “Property”) in the amount of \$278,579.00. The loan was evidenced by a “Georgia FHA Security Deed and Note,” naming LEND AMERICA, as the “Lender. The loan was to be repaid over thirty years at a fixed interest rate of 6.500 percent. Thereafter, GMAC MORTGAG LLC (hereinafter “GMAC”) purportedly acquired the security Deed by virtue of an “Assignment” performed on August 19, 2010. The Property was subsequently sold by GMAC at a nonjudicial foreclosure sale (the “Sale”) on January 2, 2013 to Appellee COLFIN AI GA I, LLC.

On December 17, 2012, prior to the January 2, 2013 nonjudicial foreclosure sale, Appellant filed a Complaint in the United States District Court, Southern District of New York under Case No. 1:12-cv-09201-GBD-RLE contesting GMAC's title to the property. Despite Appellant's New York Action, COLFIN AI GA I, LLC filed an Affidavit for Summons of Dispossession against the Appellant and all other occupants in the Magistrate Court of DeKalb County on May 27, 2014. Appellant responded to COLFIN AI GA I, LLC's Affidavit for Summons of Dispossession by filing an Answer and Motion to Abate Dispossession Proceedings ("Motion to Dismiss"), based on the earlier filed Complaint in the United States District Court, Southern District of New York involving the Property.

On June 19, 2014, the parties appeared before the DeKalb County Magistrate Court the Honorable Gary J. Leshaw for trial on COLFIN AI GA I, LLC's Affidavit for Summons of Dispossession. The Dekalb County Magistrate denied Appellant's Motion to Dismiss and then, without Motion or demand from Appellee COLFIN AI GA I, LLC, and without holding a hearing to determine rent amounts, or having any evidence in support thereof, ordered Appellant to pay into the registry of the court \$4000.00 immediately and \$1000.00 monthly if an appeal is filed. Appellant then filed a timely Motion to Set Aside asserting that her rights to due process were denied where she was given no hearing before the lower

court ordered her to pay the above mentioned sums into the registry. The lower Court denied her motion to set aside judgment. Thereafter Appellant submitted to the DeKalb County Superior Court a Petition Writ of Certiorari after having been sanctioned by the Presiding Superior Court Judge. Appellant's Petition Writ of Certiorari raised two errors of the Magistrate Court below. 1) the lower court held no hearing, reviewed no evidence and elicited no testimony before ordering the Petitioner to immediately pay \$4000.00 into the registry for rent and then \$1000.00 monthly in order to remain in the subject property in the event Appellant files an appeal and 2) the lower court should've abated the dispossessory action pursuant to O.C.G.A. § 9-2-5(a) and, O.C.G.A. § 9-2-44(a) until Appellant's New York action contesting title was resolved.

On April 23, 2015 a hearing was held in the DeKalb County Superior Court on Appellant's Petition Writ of Certiorari. Although both counsels for Appellees came unprepared and without allowing Appellant to state the facts of her case, the trial Court summarily dismissed Appellant's Petition Writ of Certiorari.

BRIEF IN SUPPORT OF APPLICATION FOR DISCRETIONARY APPEAL

Reasonable Rental value

OCGA § 44-7-56 provides that pending an appeal the trial court may require payment of rent into the registry of the court, even if the relationship as

tenants at sufferance has not been decided by the court. See *Thomas v. Wells Fargo Credit Corp.*, 200 Ga.App. 592, 594(5), 409 S.E.2d 71 (1991); *Hyman v. Leathers*, supra at 113, 308 S.E.2d 388; *Williams v. Durham*, 77 Ga.App. 840, 841-842, 50 S.E.2d 373 (1948). The amount of rent is the reasonable rental value if no prior rent had been established and, upon failure to pay, the landlord is entitled to an immediate writ of possession. *Hall v. VNB 676*676 Mtg. Corp.*, 170 Ga.App. 867, 318 S.E.2d 674 (1984); *Bible v. Allday*, 93 Ga.App. 231(2), 91 S.E.2d 306 (1956).

In the case before the court, there was no hearing or evidence presented to determine "the reasonable rental value" that Petitioner is entitled to pay into the registry. In fact, the Appellee COLFIN AI GA I, LLC never even demanded or motioned the court for any rent whatsoever. The Magistrate Judge, however, ordered the Petitioner, sua sponte, to pay \$4000.00 immediately and \$1000.00 monthly into the registry of the court in the event Petitioner files an appeal.

OCGA § 44-7-56 provides that "the court may upon motion of the landlord and upon good cause shown order the tenant to pay into the registry of the court all sums found by the trial court to be due for rent in order to remain in possession of the premises." In the case of *Green v. Barton*, 237 Ga. App. 553, 515 S.E.2d 864 (1999), the court in analyzing the legislative intent of OCGA § 44-7-56 concluded that: "We construe the permissive language of the statute to mean that unless the

landlord moves the Court to require payment of rent into the registry of the court, the tenant could remain in possession without such payment, pending appeal.”

In the instant case, the Appellee COLFIN AI GA I, LLC never moved the Court to require payment of rent into the registry. Additionally, OCGA § 44-7-56 contemplates, that in addition to a landlord’s motion, there would be some kind of hearing to determine the amount of rent where it says "... and upon good cause shown order the tenant to pay into the registry of the court all sums found by the trial court to be due for rent in order to remain in possession of the premises." Here, there was no hearing, evidence or even sworn testimony that was presented or elicited for the Court to derive at the amounts it ordered the Appellant to pay. In other words, there was no “good cause shown” to determine the amount of rent Appellant should pay in order to remain in possession of the premises.

Appellant contends that the amounts determined by the Magistrate were not reasonable rental value where no evidence had been presented to determine the amounts and especially where there was no demand from the Appellees for any rent. Writ of certiorari should have issue so that, at minimum, a hearing could’ve been held to determine a reasonable rental value that Appellant should pay. Inasmuch as the lower court had failed to establish any basis upon which it determined Appellant’s to pay into the registry, because no evidence was presented and no testimony was taken.

Writ of Certiorari

The trial court dismissed Appellant's Petition for Writ of Certiorari without requiring the Appellees to follow proper procedure and without allowing appellant to argue her cause.

O.C.G.A. § 5-4-7 sets forth that:

The answer to the writ of certiorari shall be filed in the clerk's office within 30 days after service thereof on the respondent unless further time is granted by the superior court.

In this case, although Appellees were properly served no answers were ever filed. Moreover, respondent judge Respondent has failed to certify and send up the record as required by O.C.G.A. § 5-4-3. See *Stoufer v. Missenheimer*, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

In view of the foregoing Appellant Prays this Court grant her discretionary appeal.

Submitted this 30th day of April, 2015.



Janette Bowen,
4030 Weelaunee Road
Ellenwood, GA 30294
404-243-9441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the within and foregoing Application for Discretionary Appeal, Brief in Support of Application for Discretionary Appeal and Index of Exhibits to Appellee, through its counsel of record, via first-class, United States Mail, postage prepaid, to:

Mark A. Thompson
Senior Assistant County Attorney
1300 Commerce Drive, 5th Floor
Decatur, GA 30030
(404) 371-3011
(404) 371-3024

Ms. Lauri W. Gerson
Morris Manning & Martin, LLP
990 Hammond Drive, Suite 300
Atlanta, GA 30328

Submitted this 30th day of April, 2015.



Janette Bowen,
4030 Weelaunee Road
Ellenwood, GA 30294
404-243-9441