I. PROCEEDINGS BELOW

The Bank of New York Mellon F/K/A The Bank of New York Trustee ("BNY") filed a dispossessory action in State Court of Cobb County on or around February 21, 2010 claiming Ms. Stone was a tenant in sufferance [MT-5/3/10-2-@ 2][1]. Ms. Stone timely answered, denying that she was a tenant in sufferance [MT-8/9/10-7@6], counterclaimed, and Demanded a Jury Trial on March 01, 2010 [MT-8/9/10]. [2]

A dispossessory hearing was scheduled for March 23, 2010 [MT-5/3/10-2@6] of which BNY and their legal counsel had actual knowledge. BNY and their counsel, made no appearance; Ms. Stone was the only party that appeared [MT-08/09/10-6@23]. Rather than sanction BNY or their legal counsel, the Court awarded them a continuance.

March 17, 2010 the clerk prepared a Notice of Pre-Trial Calendar set for May

[1] MT 5/3/10-2-@ 2 = Motion Hearing Transcript of May 3, 2010, page 2, at line 2.

[2] Although the Court in the May 3, 2010 Hearing stated answer and counter was filed on March 10, 2010; the August 9, 2010 Hearing correctly stated that Ms. Stone's responsive pleadings were filed on March 1, 2010.

3, 2010, for which Ms. Stone prepared her Pre-Trial response and filed it on April 25, 2010.

On April 22, 2010 opposing counsel, without Ms. Stone's knowledge, had contacted the clerk and told her that Motion to Compel Rent ("Rent") needed to replace the Pre-Trial procedure because they would be filing for Summary Judgment ("SJ") "in the next few days", and the Pre-Trial conference should "be postponed until after Plaintiff's Motion for Summary Judgment ("MSJ") is ruled on.". [MT-5/3/10-2@12]

April 27, 2010 BNY filed Motion for Summary Judgment. At the May 03, 2010 Rent hearing, opposing counsel requested that MSJ be heard at the current hearing [MT-5/3/10-3-@1], which the Court denied after stating "unless she agrees to"[MT-5/3/10-3-@10-19]. Ms. Stone Responded to SJ June 16, 2010.

To date, neither the Dispossessory hearing, nor the pre-trial conference, ever concluded, both of which were continued on the court's own initiative. [MT-5/3/10-3-@19]. Ms. Stone's answer to the complaint was that she was not a tenant at sufferance [MT-5/3/10-4-@7], and that she owns her home [MT-5/3/10-4-@10]. The court and opposing party, decided to ignore those two claims, that there would be no discovery, and no Jury Trial, all of which Ms. Stone had a statutory right to.

The Court held a SJ Hearing on August 9, 2010 [MT-8/9/10] and on August 18, 2010 Ruled in favor of BNY in a one page Order, devoid of findings, and in which the trial court ruled on evidence and on matters that she previously admitted that she didn't have jurisdiction over[MT-5/3/10-5-@22-23], and in which she failed to make findings of facts.

Ms. Stone timely filed Notice of Appeal August 23, 2010. According to the Notice from this Court the Appeal was Docketed October 08, 2010; oddly, Ms. Stone did not receive Notice of Docketing in the mail until October 13, 2010.

II. JURISDICTION AND ENUMERATION OF ERRORS

Pursuant to Rule 22 (a) and O.C.G.A. §5-6-40, the enumeration of errors shall be Part 2 of the appellant's brief… and (b) The enumeration of errors shall contain a statement of jurisdiction…

A. STATEMENT OF JURISDICTION

The Georgia Court of Appeals has jurisdiction in this Appeal because The Court of Appeals of Georgia reviews all appeals from the trial courts which jurisdiction has not been exclusively reserved to the Supreme Court.

The Constitution of the State of Georgia, Article VI, Section VI, Para. I et seq., provides that the Supreme Court has exclusive jurisdiction over election

contests, the construction of treaties or the Constitutions of the State of Georgia and the United States and challenges to the constitutionality of a law, ordinance or constitutional provision.

The Supreme Court has general appellate jurisdiction over cases involving title to land; equity; wills; habeas corpus; extraordinary remedies; divorce and alimony; all cases certified to it by the Court of Appeals and all cases in which a sentence of death was or could be imposed.

B. ENUMERATION OF ERRORS

1. The trial Court erred when it rewarded BNY and their attorney with a continuance for failure to appear at calendar call for a dispossessory hearing, without offering excusable explanation. Ms. Stone was present for the calendar call [MT-8/9/10-6@23], but for an officer of the Court to ***forget*** to come to trial, the Court fail to chastise, sanction, or what most courts regularly do for failure to appear, dismiss for failure to prosecute.

2. State Court, having had attorney telephoned, and finding that he just ***forgot*,** erred, when acting on the Court's own initiative (acting on behalf of Plaintiff and its attorney), Granted a continuance [MT-8/9/10-6@18thru25] with notice or a Motion being filed by Plaintiff, that Ms. Stone could object to; instead, the Judge

acted as counsel for the Plaintiff, she Motioned herself for, and Granted the Plaintiff a continuance.

3. Throughout the case, the trial court erred by consistently violating Ms. Stone's Rights, showed Ms. Stone disparate treatment, lacked of neutrality, abused it's discretion by failing to sanction BNY and their attorney for failing to appear at calendar call. [MT-8/9/10-7@2thru8] Had Ms. Stone not showed up, her answer would have been stricken, period.

4. The trial court erred by allowing BNY counsel to run the court and the case, and continually made adjustments on BNY counsel's whims [MT-8/9/10-6-@19 thru25]. At the whim and ex-parte communication of BNY counsel, the May 03, 2010 hearing, without motion or notice that Ms. Stone could object to, changed from the continued hearing, to a Pre-Trial hearing. Ms. Stone filed her Proposed Pre-Trial Order. Opposing counsel obviously had another whim and filed Motion to Compel Rent, to which Ms. Stone filed Response. At the May 03, 2010 Pre-Trial Hearing, the only issues discussed were the fact that NBY had filed for Summary Judgment, and the Rent.

5. The trial Court erred by granting everything BNY requested, and ignored that Ms. Stone had denied to being a tenant at sufferance and had demanded a Jury

trial Demand [MT-8/9/10-7@-1thru8], the Court thereby treated Ms. Stone disparately and violated her rights to due process of law, under color of state law.

6. The trial court erred by refusing to have and cancelling a Pre-Trial Conference; refusing to allow discovery [MT-8/9/10-6-@-20thru25], ruled on evidence which only the Jury could do, granted Summary Judgment in favor of BNY when there were no Affidavits [MT-8/9/10-11@-3thru6], In the Court's Ruling, the Court in essence testified on behalf of BNY.

7. The trial court erred when it dismissed Ms. Stone's the counterclaim and ruled on issues which State Courts lack subject matter jurisdiction [MT-8/9/10-6-@16], ignored Ms. Stone's Jury Demand

8. Ms. Stone's Civil, and Constitutional Rights were violated by the Court [MT-8/9/10-7@2thru8].

9. The Ruling by the Court violated past case precedent and stare decisis [Order8/18/10-1,generally].

10. The Judge violated her Oath of Office by denying litigants their Rights to Due Process of Law [Order-8/18/10-generally] .

11. The ruling, was founded upon by fraud upon the Court and in violation of due process of law, thereby void and should be set aside [MT-8/9/10-11@3thru6].

12. The Court's one page ruling failed to cite any finding, authorities, or grounds for it's findings on Summary Judgment.

13. The trial court failed to liberally construe Ms. Stone's pleadings, and held her to at least as high if not higher standard the court did for represented parties.

III. ARGUMENT AND CITATIONS OF AUTHORITIES

Although Ms. Stone realizes now, that she cannot fight to have the unlawful foreclosure set aside by the State Court, and that the proper response to the dispossessory was that she is not a tenant, and the she is in fact the Owner; it is quite necessary for Ms. Stone to state that she had been caught up on her mortgage for six months before the Sale Under Power was performed. She also points out that this fact is not disputed by the Plaintiff. Ms. Stone has gone to Superior Court with the matter [MT-5/3/10-4-@-15thru20]. That being said…

Standard of Review:

The standard of review for Grant of summary judgment. On appeal of a grant of summary judgment, the appellate court must review the evidence de novo to determine whether the trial court erred in concluding that no genuine issue of material fact remains and that the party was entitled to judgment as a matter of law. ***Rubin v. Cello Corp***., 235 Ga. App. 250 (510 SE2d 541) (1998).

The standard of review for Trial court's findings of fact, is reviewed under clearly erroneous standard. ***City of McDonough v. Tusk Partners,*** 268 Ga. 693, 696 (492 SE2d 206) (1997).

Question of law standard of review is De novo or independent review on appeal. Since no deference is owed to the trial court's ruling on a legal question, the "plain legal error" standard of review is applied. ***Suarez v. Halbert***, 246 Ga. App. 822, 824 (1) (543 SE2d 733) (2000).

Argument and Citations

1. BNY and their attorney, both of whom had actual knowledge of a duly noticed Dispossessory hearing that they had requested, failed to appear for calendar call. State Court had the law clerk, or an attorney, telephone BNY's legal counsel, who said that he ***forgot***.

Forgot is not excusable neglect, "Failure or even inability to read and comply with process is …gross negligence". ***McMurria Motor Co. v. Bishop***, 86 Ga. App. 750 (72 SE2d 469). Under the circumstances, since counsel had been reached via telephone, the three minute rule should have invoked, and the case dismissed. Dismissing a complaint for failure to appear, has been the rule rather than the exception in Georgia. "Failure to appear …because of the failure of

counsel's clerical assistant to correctly annotate …calendar shows that plaintiff and its counsel were lacking in due diligence . . ." ***Stamm & Co. v. Boaz Spinning Co.***, 129 Ga. App. 779, 780-781 (201 SE2d 480) (1973). See also ***Drain Tile Machine, Inc. v. McCannon***, 80 Ga. App. 373 (56 SE2d 165) (1949). Ms. Stone has been unable to find cases that the Judge did nothing at all when a party "forgot".

The Georgia Court of Appeals has held "that failing to respond to a calendar call…disrupts court proceedings and interferes with the orderly administration of justice". ***In re Brant***, 230 Ga.App. at 284(1), 496 S.E.2d 321 (1998); ***In re Bergin***, 178 Ga.App. 454, 455, 343 S.E.2d 743 (1986); ***Shafer v. State of Ga***., 139 Ga.App. 360(2), 228 S.E.2d 382 (1976). "Such a failure is a direct contempt" ***Garland v. State of Ga***., 99 Ga.App. 826, 831-832(2), 110 S.E.2d 143 (1959); see ***In re Booker***, 195 Ga.App. 561, 562-563(1), 394 S.E.2d 791 (1990) (physical precedent only). "An attorney may be found in ***direct criminal contempt*** for interrupting court proceedings ***by failing to respond to a calendar call***". See ***In re Omole***, 258 Ga.App. 725, 727(1), 574 S.E.2d 912 (2002).

In the case at bar, not only did the Judge not sanction Plaintiff and their counsel for "failing to respond to a calendar call", the Court on it's own initiative, ***rewarded them with a continuance***; thereby making questionable the Court's

neutrality, impartiality, and violating Ms. Stone's Rights.

2. On the whims of BNY's counsel's whims, the Court changed the May 03, 2010 continuance of dispossessory hearing (they failed to appear at), first to a Pre-Trial hearing. After Ms. Stone filed her Proposed Pre-Trial Order; counsel's new whim, the issues for hearing changed to Motion to Compel Rent, Ms. Stone filed a response to that one as well.

At the hearing counsel attempted to have the hearing changed again, requesting Summary Judgment for which their Motion had only been filed a few days, and would have prevented a response from Ms. Stone. The Court, allowed BNY and it's counsel to run the Court, in doing so, the court showed great favoritism to BNY and it's counsel, the court's actions violated Ms. Stone's right to due process of law, under color of state law. "A court should be cautious in exerting its inherent power and 'must comply with the mandates of due process" ***First Bank of Marietta v. Hartford Underwriters Insurance Company,*** 2002 U.S. App. LEXIS 21117, -25; 2002 FED App. 0356P (6th Cir. 2002); ***In Re Atlantic Pipe Corp.***, 304 F.3d 136, 143 (1st Cir. 2002).

3. The trial court erred by: Refusing to allow at least limited discovery be conducted. Obviously without some discovery being permitted, Ms. Stone's

abilities were hindered I preparing for Summary Judgment, and her ability to prosecute her defense. "The defense of lack of landlord-tenant relationship is a proper defense to a dispossessory action; if the defendant so answers, a trial of the issues **shall** be had in a civil court of record." (Citations omitted.) ***Bread of Life Baptist Church v. Price***, 194 Ga.App. 693-694, 392 S.E.2d 15 (1990). See also ***Womack v. Columbus Rentals***, 223 Ga.App. 501, 503(2a), 478 S.E.2d 611 (1996).

4. The trial court erred by cancelling the pretrial conference. The court wasted Ms. Stone's time by failing to sanction BNY and it's attorney for failing to appear at the first hearing,

The defense of lack of landlord-tenant relationship is a proper defense to a dispossessory action; if the defendant so answers, a trial 694*694 of the issues raised shall be had in a civil court of record. OCGA § 44-7-53; ***Lopez v. Dlearo***, 232 Ga. 339 (206 SE2d 454); ***Lamb v. Sims***, 153 Ga. App. 556 (265 SE2d 879); see ***Rucker v. Fuller***, 247 Ga. 423 (276 SE2d 600);

5. The court erred when it ruled on evidence, which only a Jury could rule on, "failure to conduct a jury trial was a nonamendable defect where no waiver of jury trial appeared of record". See also ***Coker v. Coker***, 251 Ga. 542 (307 SE2d 921) (1983); ***Scott v. W. S. Badcock Corp***., 161 Ga. App. 826 (289 SE2d 769) (1982)

6. The court erred when she ruled while lacking all subject matter jurisdiction which the court had already admitted to. The court ruled over the counterclaim, while lacking jurisdiction for the sole purpose of blocking Ms. Stone from ever being able to set aside the unlawful Sale Under Power in any court. "[T]he constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory.." ***Anderson v. Dunn***, 19 U.S. 204, 217 (1821)

The defense of lack of landlord-tenant relationship is a proper defense to a dispossessory action; if the defendant so answers, a trial 694*694 of the issues raised shall be had in a civil court of record. OCGA § 44-7-53; ***Lopez v. Dlearo***, 232 Ga. 339 (206 SE2d 454); ***Lamb v. Sims***, 153 Ga. App. 556 (265 SE2d 879); see ***Rucker v. Fuller***, 247 Ga. 423 (276 SE2d 600); (failure to conduct a jury trial was a nonamendable defect where no waiver of jury trial appeared of record). See also ***Coker v. Coker***, 251 Ga. 542 (307 SE2d 921) (1983); ***Scott v. W. S. Badcock Corp.***, 161 Ga. App. 826 (289 SE2d 769) (1982). In light of this history of construction of the language of the statute, we interpret ***Wasden v. Rusco Indus.***, supra, to mean that a judgment is always to be considered void if there is a nonamendable defect apparent on the face of the record,…is always subject to attack by motion to set aside…."

7. It was err to rule in violation of due process; Ms. Stone's Civil and Constitutional Rights were violated by the trial court. The "fundamental idea of due process is Notice and opportunity to be heard." *fn14 As stated in ***Citizens &c. Bank v. Maddox***, *fn14 "[t]he benefit of notice and a hearing before judgment is not a matter of grace, but is one of right." "A party's cause of action is a property interest that cannot be denied without due process. (Cit.)" "A judgment is void if the rendering court acted in a manner inconsistent with due process of "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." ***Old Wayne Mut. Life Ass'n v. McDonough***, 204 U.S. 8, 15 (1970).law." Wright & Miller, Federal Practice and Procedure §2862.

8. The trial court erred when it ruled against past cases, and staire decisis. The Supreme Court of Georgia has "reiterated the need to adhere to precedent so as to promote the rule of law and its predictability", see Judge Miller concurring specially in ***Fleet Finance &c. v. Jones,*** 263 Ga. 228, 232 (3) (430 SE2d 352) (1993) "The application of the doctrine of stare decisis is essential to the performance of a well‑ordered system of jurisprudence. " (Citations omitted.)

Etkind v. Suarez, 271 Ga. 352, 357 (5) (519 SE2d 210) (1999).

9. The ruling by the court is in err, as it failed to make the necessary findings, and/or failed to find on a material issue thereby the Ruling is error. See ***White v. Johnson***, 259 S.E. 2d 731, 151 Ga. App. 345 September 14, 1979 which held: "Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate finding to be made." 5A Moore, Federal Practice ¶2718, 52.06[2]. (2d Ed. 1953). (cases cited) "***Spivey v. Mayson***, 124 Ga. App. 775 (186 S.E. 2d 154)." "***Bituminous Cas. Corp. v. J.B. Forrest & Sons***, 132 Ga. App. 714, 720 (209 S.E. 2d 6) (1974)". The trial courts' lack of findings of fact and Conclusions of law are deficient, they fail to resolve a "material issue".

10. The trial court erred when it violated the Oath Of Office, by failing to adhere to the State of Georgia Constitution, and violated Ms. Stone's Rights guaranteed under the Constitution of Georgia and United States Constitutions. ***In RE: Law Suits of Anthony J. Carter*** (two cases) 235 Ga. App. 551, 510 S.E.2d 91, (1998) it was held:

> "As stated in paragraph 12 of the Georgia Bill of Rights, a person has a right to represent himself or herself in court. … Secondly, the

> very first provision of the Bill of Rights in "`[t]he constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. (Cit.)'" These fundamental constitutional rights require that every party. . . the opportunity to be heard and to present his claim or defense, i.e., to have his day in court. (Cits.)'" "So it is that meaningful access to the courts must be scrupulously guarded, as it is a constitutional right universally respected where the rule of law governs. (Cits.)'"

11. The trial court erred by failing to prevent a fraud upon the court by BNY and their counsel, to to obtain the ruling I their favor. Fraud upon the Court "is fraud which is directed to the judicial machinery itself … ***H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.,*** 536 F.2d 1115 (6th Cir.). Since "attorneys are officers of the Court" if they are involved in the "dishonest conduct", the conduct constitutes "fraud on the Court" ***Porter,*** 536 F.2d at 1119. ***Bulloch v. United States***, 763 F.2d held the "court may investigate a question as to whether there was fraud in the procurement of a judgment. ***Universal Oil Products Co. v. Root Refining Co.***, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447. This is to be done in adversary proceedings …. See ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.,*** 322

U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; ***Sprague v. Ticonic National Bank***, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; and ***United States v. Throckmorton***, 98 U.S. (8 Otto) 61, 25 L.Ed. 93."

"Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself … ***H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.***, 536 F.2d 1115 (6th Cir.). It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function--thus where the impartial functions of the court have been directly corrupted." ""'Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." ***Porter,*** 536 F.2d at 1119.""

12 . "The general rule is that pro se pleadings are held to less stringent standards than pleadings that are drafted by lawyers" (Citation and punctuation omitted.) ***Hickey v. Kostas Chiropractic Clinics, P.A***., 259 Ga. App. 222, 223 (576 SE2d 614) (2003). See also: ***Cotton v. Bank South, N. A***., 212 Ga. App. 1, 3 (1) (440 SE2d 704) (1994); ***Thompson v. Long,*** 201 Ga. App. 480, 481 (1) (411 S.E.2d 322); ***Jenkins v. Blue Moon Cycle, Inc***., 627 S.E.2d 440, 277 Ga.App. 733 (Ga.App. 02/23/2006); ***Evans v. City of Atlanta,*** 189 Ga. App. 566, 567 (377

SE2d 31) (1988); see ***Haines v. Kerner,*** 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972), ***Dillingham v. Doctors Clinic***, 236 Ga. 302 (223 SE2d 625) (1976). In ***Thompson v. Long,*** (201 Ga. App. 480) (411 SE2d 322) (1991) this Court held that "OCGA 9-11-8 (f) requires that [a] 11 pleadings . . . be so construed as to do substantial justice." See ***Glaser v. Meek***, 258 Ga. 468 (3) (369 SE2d 912) (1988).

"This court has repeatedly held that the spirit and intent of the Civil Practice Act require that pleadings are to be liberally construed in favor of the pleader." ***Mills v. Bing,*** 181 Ga. App. 475, 476 (352 SE2d 798) (1987); ***Tahamtan v. Dixie Ornamental Iron Co.***, 143 Ga. App. 561 (239 SE2d 217) (1977).

The language used in ***Wasden v. Rusco Indus.***, 233 Ga. 439, 445 (211 SE2d 733) (1975), by the Supreme Court to specify when a judgment is void on its face and thereby is subject to being set aside due to a nonamendable defect apparent on the face of the record. The court held that "a judgment is void on its face when there is a non-amendable defect appearing on the face of the record or pleadings " Id. at 444. See also ***Ricks v. Liberty Loan Corp.***, 146 Ga. App. 594 (1 & 2) (247 SE2d 133) (1978) (cert. den.). See, e.g., ***Cambron v. Canal Ins. Co.***, 246 Ga. 147 (1) (269 SE2d 426) (1980) (holding that an order denying a motion for new trial

was properly set aside based on the court's failure to notify the appellant of the decision); ***Beach's Constr. Co. v. Moss,*** 168 Ga. App. 462 (309 SE2d 382) (1983) (holding that the failure of counsel or a party acting pro se to receive notice of trial was such a defect would authorize setting aside of judgment against that party); ***Brown v. Wilson Chevrolet-Olds***, 150 Ga. App. 525 (258 SE2d 139) (1979) (failure to endorse the defendant creditor's answer on a personal property foreclosure petition was a nonamendable defect rendering the judgment subject to set aside); ***Redding v. Commonwealth of America***, 143 Ga. App. 215, 216 (1) (237 SE2d 689) (1977), disapproved on other grounds in ***Wise, Simpson &c. Assoc. v. Rosser White &c., Inc***., 146 Ga. App. 789, 795-796 (247 SE2d 479) (1978) (failure to conduct a jury trial was a nonamendable defect where no waiver of jury trial appeared of record). See also ***Coker v. Coker,*** 251 Ga. 542 (307 SE2d 921) (1983); ***Scott v. W. S. Badcock Corp.***, 161 Ga. App. 826 (289 SE2d 769) (1982). In light of this history of construction of the language of the statute, we interpret ***Wasden v. Rusco Indus., supra***, to mean that a judgment is always to be considered void if there is a nonamendable defect apparent on the face of the record,…is always subject to attack by motion to set aside…."

PRAYER FOR RELIEF

Ms. Stone Prays that this Honorable Court will remand this matter to the trial court with direction on Jury trial and to transfer the counterclaim to Superior Court to be consolidated with the new action for Unlawful Foreclosure pending in that Court.

Respectfully submitted, this 27th day of October, 2010,

By; _____

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CERTIFICATE OF SERVICE

I Certify that I have this 27th day of October, 2010 served a true and correct copy of the foregoing Appellant Brief upon the Appellee, through their attorney on file, by causing to be deposited with USPS, First Class Mail, proper postage affixed and addressed as follows:

Peter Lublin
Rublin, Lublin, Suare, Serrano
3740 Davicini Court, Ste 100
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_____
Christine Stone