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Extensions on the Time to Answer a Georgia Lawsuit MUST be Filed with the Court – DON'T Let the Plaintiff's Attorney Fool You into Accepting a Fake Extension

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The Scenario/Problem:

It is an all-too-common occurrence – I am hired to defend a lawsuit that is already in default (more than 30 days post-service). Sometimes I receive a case and there is already a default ***judgment*** entered against the client. When I ask if an extension was filed the response is: "*No, but the plaintiff's attorney emailed me an extension*," or, worse, "*No, but the plaintiff's attorney gave me an extension over the phone*" (worse because it is harder to prove). However, unfiled extensions are not valid in Georgia.

The result is that many clients, believing that they have an extension, have unwittingly entered default with a default judgment possible at any time. Sometimes, when I contact the court (despite the plaintiff's promise of an "extension"), the plaintiff's attorney has already moved for and obtained a partial default judgment against the client as to liability (under O.C.G.A. § 9-11-55) and requested a trial on damages. This issue comes up a lot when parties and/or their insurers want to try to negotiate and settle a case before incurring defense costs. This is often a great idea – so long as you do not go into default in the process and lose your bargaining power. With a default judgment, liability is established in tort cases and a trial scheduled on damages. In contract cases, if damages are liquidated, a default judgment may immediately be a final judgment on the merits. Default judgments are disfavored, but they are not to be taken lightly either.

The Law/Rule:

"A defendant shall serve his [or her/its] answer within 30 days after the service of the summons and complaint upon [that defendant], unless otherwise provided by statute." Ewing v. Johnston, 175 Ga. App. 760, 761, 334 S.E.2d 703, 705 (1985); O.C.G.A. § 9-11-12(a). "Time would appear to begin to run from date of actual service upon a defendant, and not from filing of the return." Id. "***A private agreement between counsel [or the parties] extending time to file pleadings is not binding except when in compliance with this code section*** [O.C.G.A. § 9-11-6(b)] ***and it is filed with the court***." Ewing v. Johnston, 175 Ga. App. 760, 762, 334 S.E.2d 703, 705 (emphasis supplied) (citing Minnesota Mut. Life Ins. Co. v. Love, 120 Ga. App. 502 (171 SE2d 361)).

Awkward Solutions:

Again, the courts disfavor default judgments. There are provisions that often (not always) allow our firm, as defense counsel, to open a default and even to set aside default judgments in certain circumstances. ***However***, to accomplish that, we must usually file a motion and an affidavit explaining the reasons for the delay in answering the suit. We must attempt to prove things like "*excusable neglect*," "*providential cause*," or that a "*proper case*" has been made under O.C.G.A. § 9-11-55(b). That can be awkward, as the explanation more often than not is human error (a mistake) on the part of the client, an insurer, an insurance agent/broker, or another (e.g., a third-party adjusting firm). Having to explain these such matters, or even to explain that, "*the plaintiff's attorney gave me an extension*," that was not filed can create tension and cause problems with opposing counsel and/or the court.

For example, admitting that the defense accepted opposing counsel's fake "extension" that was never filed (or even reduced to writing) is an admission that the plaintiff's attorneys successfully deceived the defense. It is also an accusation against opposing counsel that could have a negative or even chilling effect on future settlement negotiations. When the position is that the case was misfiled or not turned over to the proper parties, that too is an awkward matter to explain to the court. While there are case precedents in support of opening a default or setting aside a default judgment for all these scenarios, filing a motion on those grounds never casts the defense in a positive light.

Worse still, under O.C.G.A. § 9-11-55(b), we must "…*announce ready to proceed with trial*," in order to open a default, even though presumably no discovery has been completed. Unless the plaintiff wants to conduct discovery, the defense may be required to try the case much sooner than is typical or, more likely, to move the court for discovery time that it would otherwise have been entitled to when timely answering the complaint.

The Better Solution:

The foregoing issues can be resolved by: (1) getting the extension in writing; and (2) filing it with the court where the complaint (lawsuit) was filed. Our firm will provide a free form/template for extensions to anyone who wants it. While Georgia law precludes a non-attorney from filing anything on behalf of a corporate entity (e.g., a corporation, LLC, etc.) in a court of record (see Eckles v. Atlanta Tech. Grp., 267 Ga. 801, 804, 485 S.E.2d 22, 25 (1997)), the plaintiff's attorney can handle the filing so long as you ensure that this is actually done. *Individual* (not corporate) defendants can also file them pro se with the court. Defense counsel can always be retained later to respond to the complaint so long as the extension is filed. Speaking for our firm only, we are also perfectly happy to limit the scope of our initial representation to filing the extension for you while you continue negotiations the plaintiff directly without our assistance if that is your desire. We know in many cases you want that extension to settle the case without having to pay us to defend it, and that is okay. Just let us know that is what you are doing, and we will gladly help you avoid going into default and having to explain this to the court. If the negotiations fail, then you have defense counsel ready and in place.

The Short Version:

File written extensions to avoid default (we can provide a form if you like), or contact us, and we will gladly file an extension for you (bearing in mind that all parties have to agree to the extension).