

**WHOSE FIXTURE IS IT, ANYWAY?**  
**Fixture Ownership in Defaulting Tenant Situations**

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## WHOSE FIXTURE IS IT ANYWAY?

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### **I. The Nature of Fixtures Depends on the Relationship of the Parties.**

One of the most important rules in determining fixture ownership is to remember that the law of fixtures as it relates to landlord and tenant relationships differs from the law of fixtures in other situations, such as how fixtures relate to Grantor and Grantee and Mortgagor and Mortgagee relationships. Adams v. Chamberlin, 54 Ga. App. 459 (1936).

The primary reason for the distinction is the intent of the parties: The intent of a tenant when installing an item in leased realty is usually for the item to be temporary, where the intent of an owner when installing an item in its own realty is usually for the item to be permanent, and therefore a non-removable fixture. *See, e.g. McCall v. Walter*, 71 Ga. 287 (1883).

The scope of the following paper covers fixtures as they relate to landlord and tenant relationships and does not cover other situations, such as how fixtures relate to Grantor and Grantee and Mortgagor and Mortgagee relationships.

## **II. General Rules and Exceptions**

### **A. When does an item become a fixture?**

Items not annexed and necessarily attached to the realty are generally considered movable items, and not permanent fixtures. If an item is movable, and not affixed to the realty, then the item is presumed to belong to the tenant, and the tenant may remove the item as the tenant desires. However, the tenant has no rights beyond the use of land and tenements rented to it and such privileges as are necessary for the enjoyment of its use. Therefore, a tenant has no right to remove permanent fixtures or to cause injury to the property. O.C.G.A. § 44-7-1. It is often difficult to distinguish between which items are movable, and which are permanent fixtures, but the rule in most jurisdictions, including Georgia, is an item is considered a permanent fixture if it is substantially integrated into the property (whether land or building) so that its removal would cause injury to the property.

B. Exception to General Rule of Irremovability of Fixtures: Trade Fixtures.

The exception to the rule that a tenant cannot lawfully remove fixtures annexed to the freehold, even if the tenant installed the fixtures itself, is in the case of trade fixtures. O.C.G.A. § 44-7-12; Wright v. DuBignon, 114 Ga. 765 (1902); Armour & Co. v. Block, 147 Ga. 639 (1918). A trade fixture is an article of personal property placed by a tenant on the leased property for the purpose of furthering his use of the leased property for the trade or business for which it was leased. J.K.S.P. Restaurant, Inc. V. Nassau County, 513 N.Y.S.2d 716 (1987); R & D Amusement Corp. v. Christianson, 392 N.W.2d 385 (N.D. 1986). So, in the case of trade fixtures, a tenant may install an item so as to substantially integrate it into the real property, and still rightfully remove it before the expiration of the lease term. It is important to remember this exception applies only to trade fixtures, and no other fixtures. Wright; Raymond v. Strickland, 124 Ga. 504 (1905).

However, trade fixtures, even if removable, must be removed without damage to the realty. A tenant is under a duty to exercise ordinary care and diligence to prevent damage to the rented premises, and such duty is by implication a part of the lease contract. Even in a situation where a tenant needs to make improvements to the leased premises to make it suitable for the operation of its business or trade, it nonetheless impliedly, if not expressly, covenants that it will not cause substantial injury to the premises. Martin v. Medlin, 81 Ga. App. 602 (1950).

Another factor to consider in determining whether the tenant can remove certain fixtures which might be considered trade fixtures, is who installed the items. It is implied by the Georgia courts that in order for a tenant to have the right to remove a fixture, not only

must the fixture fall within the definition of a “trade fixture”, but the tenant or the tenant’s predecessor in interest must have also installed the fixture. For example, in one Georgia case, the counters and drawers in a drug store installed by the landlord, and rented in their place with the store, were considered fixtures, which the tenant has no right to remove. Pope v. Gerrard, 39 Ga. 471 (1869). Given that counters and drawers do in fact further the trade or business of a drug store, and the items may very well be capable of removal without substantial injury to the premises, it is likely the Court may have ruled otherwise had the tenant, instead of the landlord, installed the counters and drawers.

C. Clear Expressions of Intent Prevail Over General Rules.

Notwithstanding the foregoing, whenever the landlord and tenant clearly express their intent, by way of an express lease provision, or otherwise, Georgia courts enforce the intention of the parties. If the intent is express, the Courts enforce the intent of the parties even if such intent directly contravenes the law in the absence of an expressed intent. For example, a building can be a fixture if the lease so provides, giving the tenant the right to remove a 50 story building from land after expiration of a ground lease, even though the same building is deemed an irremovable fixture in the absence of the applicable lease provision. Friedman on Leases, § 24.2.

Courts also enforce an intent that can be inferred from the circumstances, but the test of intent is an objective test. One should consider all the circumstances attending the affixation of the item, and if a different intent can be inferred, then the intention the law can infer is of an ordinary reasonable person to have had, based on the facts and circumstances in the record. Murray v. Zerbel, 764 P.2d 1158 (Ariz. App. 1988); Northern Natural Gas Co. v. State Board. Of Equalization & Assessment, 232 Neb. 806, (1989); Wyoming State Farm

Loan Board. V. Farm Credit System Capital Corp., 759 P.2d 1230 (Wyo. 1988). The subjective intent of the tenant, if not expressed in the lease and thereby agreed to by the landlord, will not, in and of itself, create for the tenant a right of removal of the item. For example, in one Georgia case, gutters attached to the roof of a house and water pipes laid under the ground by a tenant on leased premises, become, when constructed and attached, a part of the freehold, and cannot be lawfully severed from the land by the tenant against the will of the landlord, even though at the time of their erection the tenant intended to remove them at the expiration of his term. Wright

Even though the law in Georgia allows the parties the freedom to contract regarding the removal of fixtures, many leases contain, often to the detriment of one or more of the parties, catch-all provisions addressing “fixtures” generally, which still requires a determination of what items are considered “fixtures”. Causing even more confusion in the light of the legal distinction between “fixtures” and “trade fixtures” is the failure of many leases to establish the items the parties consider “fixtures” and the items considered “trade fixtures”. A well-drafted lease provision explicitly states which items are removable and which are not. Often the parties are better served by a lease provision enumerating the removable items and stating that unless the items are listed as removable, the landlord has the right to ownership. The lease provision should also contain specific language as to the condition in which the tenant should leave the property after removing removable fixtures.

#### D. Three Prong Test.

Some courts have adopted a three-prong test, which, while not expressly adopted by Georgia courts, seems to be applicable based on Georgia case law cited herein. The prongs are as follows:

- i. The degree of the item’s annexation to the property—whether it can be removed without material injury to the land or building to which it was attached; and
- ii. The extent to which the item was adapted for the intended use of the property, that is, its appropriateness for the purposes for which the property was used; and
- iii. The intention of the person who annexed it.

Thornton Props v. Alabama Power Co., 550 So. 2d 1024 (Ala. 1989); Community Bank of Homestead v. Barnett Bank of the Keys, 518 So. 2d 928 (Fla. App. 1987); Lau v. Indiana National Bank, 506 N.E.2d 70 (Ind. 1987); Allentown Plaza Associates. v. Suburban Propane Gas Corp., 43 Md. App. 337 (1979); Hall v. Luby Corp., 556 A. 2d 1317 (N.J. Super. 1989); Norstar Leasing Services. v. Colonie Coliseum Enterprises., 546 N.Y.S.2d 942 (1989); Canon-McMillan School Dist. v. Bioni, 561 A.2d 853 (Pa. 1989); Martinez v. Ball, 721 S.W.2d 580 (Tex. App. 1986); West Virginia Department of Highways. v. Thompson, 375 S.E.2d 585 (W. Va. 1988)

E. Exception to General Rule that Expressed Intent Prevails: VARA.

One notable exception to the rules mentioned above came about in 1990 with the implementation of the federal Visual Artists Rights Act of 1990 (VARA). 17 U.S.C. § 101, et. seq. VARA gives rights to artists to enjoin the removal, modification, or destruction of works of visual art under certain conditions if the visual art is not a “work made for hire”, as U.S. Copyright laws define that term. If a work is of “recognized stature”, its destruction could be prevented, regardless of whether it is attached as a fixture to someone else’s property.

VARA has frightening implications for landlords since it trumps not only state law but also express lease provisions between a landlord and tenant. Since VARA is designed to benefit artists, and neither the landlord nor tenant, the lease is not a factor for consideration for the court in enforcing artists' rights under VARA. The best example is the landmark case of Carter, et.al., v. Helmsley-Spear, Inc., 861 F. Supp. 303 (SDNY 1994). In Carter, the U.S. District Court issued a permanent injunction prohibiting the destruction or removal of a vast sculpture, which was commissioned by a net tenant in the building, and located in the lobby of a New York City warehouse building. Fortunately for the landlord, the decision was later overturned on appeal, but only because the Court of Appeals determined the art was in fact a "work made for hire".

The lesson for landlords in Carter is that a landlord should prohibit installation of any work of art that would be incorporated into or become a part of the building, without prior written consent. If such consent is granted, the tenant must be required to obtain a written agreement with any artist prior to creation of a work of art in the landlord's building, satisfactory to landlord. The agreement should authorize the removal of the work of art at the expiration or termination of the lease regardless of whether that may be accomplished with or without damage to the work of art. The agreement must also require indemnification from the tenant, which indemnification should survive termination of lease. The artist must also declare whether the work is for hire. Without such an agreement, the landlord is required under Carter and VARA to make a factual showing that the art is a work for hire, or that it can be removed without damage to the art.

### **III. How Default Situations Change the General Rules.**



#### A. The Waiver of a Tenant's Right to Remove upon Abandonment

A tenant's right to remove trade fixtures is generally waived if the lease expires and the trade fixtures are not removed prior to the expiration of the term. Powell v. Griffith, 38 Ga. App. 40 (1928); Carr, et al v. Georgia Railroad, 74 Ga. 73 (1884); Youngblood & Harris v. Eubanks, 68 Ga. 630 (1882); Raymond; Friedman on Leases, § 24.2. Contrary to the majority rule, Georgia does not apply this rule to the renewal of a lease, even though technically upon renewal, the old term expired. In Georgia, the tenant retains its right to remove its trade fixtures until its rightful possession of the premises ends.

The same rule of waiver applies if a tenant abandons the premises prior to the expiration of the term. In the case of abandonment of the premises, the tenant is also deemed to have abandoned its trade fixtures. After abandonment, the trade fixtures become the property of the landlord. O.C.G.A. § 44-7-12.

Again, it is important for the landlord to distinguish between personal property and trade fixtures, as a tenant does not waive its right to personal property left on premises for which the lease has expired, unless the lease specifically states that such personal property becomes the property of landlord. Cozart v. Johnson, 181 Ga. 337 (1935). If a landlord improperly removes personal property, the landlord may be liable for conversion or negligent damage to property. Wright; Richards v. Gilbert, 116 Ga. 382 (1902).

However, a landlord is entitled, pursuant to O.C.G.A. § 44-14-341, to a general lien on all personal property of a tenant located on the premises leased. Although not widely used, and frequently subordinated to the landlord's mortgagee, an action in distraint for rent is available to the landlord, and a landlord may be able to claim a right in a tenant's personal property pursuant to this code section.

B. A Tenant at Sufferance Waives its Right to Remove Trade Fixtures.

Upon expiration of a lease, even if the tenant refuses to deliver possession to the landlord, thus becoming a tenant at sufferance, the tenant waives its right to remove its trade fixtures. In Chouinard v. Leah Enterprises, Inc., the tenant was not allowed under O.C.G.A. § 44-7-12 to remove its trade fixtures from the premises, as the fixtures became the property of the landlord when the tenant failed to vacate upon expiration of the lease. Chouinard v. Leah Enterprises, Inc., 205 Ga. App. 206 (1992) cert. denied, TMS Insurance Agency, Inc. v. Galloway, 205 Ga. App. 899 (1992). This rule prevails even in an event where, during dispossessory proceedings, a landlord accepts payment of rent pursuant to a consent agreement with the tenant. The court held in Chouinard that the landlord's acceptance of rent in that situation did not amount to acquiescence by landlord of tenant's possession of the premises, and consequently, tenant had no right to remove its trade fixtures once its rightful possession of the premises ended.

C. How a Tenant's Non-Payment of Rent Affects its Right to Remove Trade Fixtures.

Consistent with the rule that provisions in a lease are determinative of whether a particular item is a fixture, Georgia courts will also uphold lease provisions which provide that a tenant cannot remove its trade fixtures until all rent is paid. Therefore it is advisable to include such a provision in a lease.

D. How a Tenant's Unauthorized Improvements or Alterations Affect the Right of Removability.

A tenant that makes unauthorized alterations or improvements to the premises does not have the right to the value of said alterations or improvements in the event of a subsequent default by tenant. Georgia Color Farms, Inc. v. K.K.L., Limited Partnership, 234 Ga. App. 849 (1998). However, in some jurisdictions, a mere unauthorized alteration, in the absence of some

other event of default, may not be a material breach of the lease. Pollock v. Adams, 548 S.W.2d 239 (Mo. App. 1954) (a restaurant tenant erected a removable partition in violation of the alterations clause that prohibited alterations without consent of landlord) It is unclear from cases decided in the Georgia courts whether the mere making of unauthorized alterations or improvements, in the absence of any other event of default, would constitute a material default entitling the landlord to either dispossessory proceedings, or, the enforcement of a lease provision allowing landlord to retain trade fixtures in the event of tenant's default.

E. The Landlord's Right to Fixtures as Against Other Creditors

In many situations a landlord can easily establish, as between the landlord and a tenant, its right to a tenant's trade fixtures either by specific lease provisions or through provisions in the law. However, often there are other creditors, besides the landlord, which might also have a right in the trade fixtures, particularly in the case of equipment which may be both leased and considered a trade fixture; therefore, it is necessary to determine who, as between landlord and creditor of tenant, has a superior claim to the fixtures.

The scope of this paper does not cover the rights of landlords as against other creditors of the tenant; however, should you need information to assist you in your research for such a topic, please feel free to contact me at the number or email address listed on the cover page, and I am glad to assist you by sending you some reference material.