

**IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA**

**MANUEL HERNANDEZ,**

**Plaintiff,**

**v.**

**STAR RESIDENTIAL, LLC, TERRACES  
AT BROOKHAVEN, LLC**

**Defendants.**

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**Case No. 18A68544-6**

**ORDER**

This case came before the Court on Defendants Terraces at Brookhaven, LLC and Star Residential, LLC’s Motion to Dismiss All Claims of Plaintiff’s First Amended Complaint for Damages. Specifically, Defendants seek dismissal of Counts II, III, and IV of Plaintiff’s First Amended Complaint on the grounds that Plaintiff has failed to state a claim under Georgia law. After reviewing the written submissions of the parties and the applicable Georgia law, and hearing argument on the matter, the Court finds as follows:

This action arose out of injuries sustained by Plaintiff, following a criminal attack at the Terraces at Brookhaven. Plaintiff alleges that, in the early morning hours of May 29, 2017, he was approaching the doorway to his apartment when he was robbed at gun point by three unknown criminal assailants. (First Amended Complaint, ¶14). Plaintiff was shot twice and rendered paralyzed as a result of the attack. (Plaintiff’s Amended Complaint ¶¶14-15, 32, and 54). Plaintiff filed his original Complaint on March 20, 2018, alleging claims of premises liability, negligent

security, nuisance, and punitive damages. Defendants filed their Answer on May 25, 2018. Plaintiff then filed his First Amended Complaint on October 31, 2018, in which he added claims for nuisance related to Georgia’s Street Gang Terrorism and Prevention Act, as well as two negligence *per se* counts for violation of City of Brookhaven and DeKalb County nuisance codes. A Second Amended Complaint was filed on December 7, 2018, identifying additional specific ordinances that he contends create duties for Defendants. (See Plaintiff’s Second Amended Complaint).

### **I. Motion to Dismiss Standard**

“A motion to dismiss for failure to state a claim should be sustained if the allegations of the complaint reveal, with certainty, that the plaintiff would not be entitled to relief under any state of provable facts asserted in support of the complaint.” LaSonde v. Chase Mortg. Co., 259 Ga. App. 772, 774, 577 S.E.2d 822 (2003). While the trial court is required to construe the allegations in the light most favorable to the plaintiff, in reviewing a motion for failure to state a claim, the trial court need not adopt a party's legal conclusions based on these facts. RES-GA YPL, LLC v. Rowland, 340 Ga. App. 713, 714, 798 S.E.2d 315 (2017). Where the pleadings and exhibits incorporated into the pleadings show a complete failure by the plaintiff to state a cause of action, the defendant is entitled to judgment as a matter of law. Wylie v. Denton, 323 Ga. App. 161, 162-63, 746 S.E.2d 689 (2013).

### **II. COUNT II: NUISANCE**

Count II of Plaintiff’s First Amended Complaint alleges a claim for nuisance under O.C.G.A. § 16-15-7, which is part of the Georgia Street Gang Terrorism and Prevention Act. According to Plaintiff, on the day of the incident, he was violently robbed and shot at gunpoint by

two shooters who were aided by a getaway driver. (Id. at ¶ 32.) Plaintiff contends this attack was not an isolated incident, as in 2017 alone, there were more than fifteen (15) violent crimes reported in the immediate area- or the equivalent of a violent crime occurring approximately every three (3) weeks. (First Amended Complaint, ¶ 28). Plaintiff alleges that the crime in the area was the result of “[t]he lack of adequate security at the Terraces[,]” which “enabled criminal street gangs to overtake the property to the point that residents were exposed to living in an environment that was equivalent to a ‘war zone.’” Id. Plaintiff further alleges that because of this criminal gang activity on the property, the Terraces constituted a public nuisance under O.C.G.A. § 16-15-7.

According to the language of the provisions of the Gang Act itself, the Gang Act was established by the Georgia General Assembly in light of Georgia’s state of crisis “caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” O.C.G.A. § 16-15-2(b). “These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.” Id. As such, the intent of the Act is, among other things, to provide an effective means of punishing and deterring the criminal activities of criminal street gangs “through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or **used** by criminal street gangs.” O.C.G.A. § 16-15-2(d) (emphasis added).

Plaintiff here contends that Defendants are liable under the Gang Act, because they allowed the use of the apartment complex by criminal street gangs for criminal enterprises, as defined in the Gang Act. See O.C.G.A. § 16-15-3. Plaintiffs further contend that O.C.G.A. § 16-15-7 specifically creates a civil right of action to abate the creation of a public nuisance and that the act does not specify against whom the action can be brought to the exclusion of private parties. Under

the section titled "Real property used by criminal street gangs declared public nuisance; abatement; persons injured by gangs entitled to treble damages," O.C.G.A. § 16-15-7 provides in relevant part:

O.C.G.A. § 16-15-7 provides:

a) **Any real property** which is erected, established, maintained, owned, leased, **or used** by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Title 41, relating to nuisances.

...

c) Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages; provided, however, that no cause of action shall arise under this subsection as a result of an otherwise legitimate commercial transaction between parties to a contract or agreement for the sale of lawful goods or property or the sale of securities regulated by Chapter 5 of Title 10 or by the federal Securities and Exchange Commission. Such person shall also recover attorney's fees in the trial and appellate court and costs of investigation and litigation reasonably incurred. All averments of a cause of action under this subsection shall be stated with particularity. **No judgment shall be awarded unless the finder of fact determines that the action is consistent with the intent of the General Assembly** as set forth in Code Section 16-15-2.

(Emphasis added) Id.

In determining the viability of the present claim as pled by Plaintiff and as intended by the legislature, the Court must look at the language of the statute, as well as to the well-established rules of statutory construction. The fundamental rules of statutory construction require the Court to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. Slakman v. Cont'l Cas. Co., 277 Ga. 189, 191, 587 S.E.2d 24 (2003). At the same time, the Court must seek to effectuate the intent of the legislature. Id.; O.C.G.A. § 1-3-1(a) ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy"). "To define the legislative intent, the court considers the purpose of the

statute and its impact on the body of law as a whole.” Telecom\*usa, Inc. v. Collins, 260 Ga. 362, 364, 393 S.E.2d 235 (1990). “The court also considers the law as it existed before the statute was passed and identifies the mischief sought to be corrected.” Id.

“[A] statute is presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. It is therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence.” Retention Alternatives, Ltd. v. Hayward, 285 Ga. 437, 440, 678 S.E.2d 877 (2009) (internal quotation marks and brackets omitted). As such, “where the statutory text is ‘clear and unambiguous,’ we attribute to the statute its plain meaning, and our search for statutory meaning ends.” Patton v. Vanterpool, 302 Ga. 253, 254, 302 Ga. 253 (2017).

“[D]efined words shall have the meanings specified, unless the context in which the word or term is used clearly requires that a different meaning be used.” O.C.G.A. § 1-3-2. “Where . . . [a term] is undefined and could have several meanings based on the manner in which it is used in [the statute], ‘it becomes necessary to give proper consideration to other related statutes in order to ascertain the legislative intent in reference to the whole system of laws of which [the statute] is a part.” Hasty v. Castleberry, 293 Ga. 727, 731, 749 S.E.2d 676 (2013). Likewise, “[i]t is a well-established principle that a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part. It is not presumed that the legislature intended that any part would be without meaning.” Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 203, 219 S.E.2d 115 (1975).

In determining the viability of a claim by Plaintiff against Defendants pursuant to the Gang Act, the Court must thus begin by applying the above rules of construction to the subject statute.

As noted, O.C.G.A. § 16-15-7 creates the civil cause of action which Plaintiff attempts to avail himself of in the present case. The first requirement under O.C.G.A. § 16-15-7(d) is that the cause of action be stated with particularity. At the outset, the Court finds that Plaintiff's claim under the Gang Act has been sufficiently plead.

Pursuant to Plaintiff's First Amended Complaint, the subject property was "'real property which is . . . used by [one or more] criminal street gang[s] for the purpose of conducting criminal gang activity,' within the meaning of O.C.G.A. § 16-15-7(a)." (First Amended Complaint, ¶ 28). Plaintiff alleges that "Plaintiff was injured by reason of criminal gang activity," "by the coordinated violent acts of three (3) individuals," "in the commission of attempted murder with a deadly weapon, assault, and robbery, which resulted in substantial bodily injury to Plaintiff." (First Amended Complaint, ¶¶ 31, 32). Moreover, Plaintiff alleges Defendants' potential liability under that statutory subpart, including how the property owner and the operator of the Property was or should have been aware of rampant gang activity at the apartment complex. (See id. at ¶¶ 27-32.)

Next, the Court must review the viability of the present claim, pursuant to the above allegations, under the Gang Act. To do so, it must review the parallel provisions under O.C.G.A. §§ 16-15-2 and 16-15-7(a) together to effectuate the purpose of the statute. This is not only in line with the rules of statutory construction, as outlined above, but expressly mandated here by O.C.G.A. § 16-15-7(c). A reading of the plain language of the statute reveals that although the statute does not expressly identify any specific defendant who may be sued in these types of action, the statute is not ambiguous. The plain language of O.C.G.A. § 16-15-7(a) expressly incorporates prior "public nuisance" law under O.C.G.A. § 41-1-3, making clear that properties "used" by gangs for criminal activity are nuisances, subject to the provisions of the predecessor statute governing

such conditions. The text of the statute merely provides that “**any real property**” being “**used**” by any criminal street gang for the purpose of conducting criminal gang activity which leads to injury to “**any person**” by reason of such activity creates a cause of action. It thus follows that the Gang Act necessarily authorizes, by operation of law, all the legal remedies for a public nuisance, against those who may have a duty to the plaintiff and allow such use. This is especially so since the statute does not expressly limit an action for treble damages only to gangs or their members. Ultimately, the Court finds that there is no limitation by the statute as to whom may be sued for the alleged public nuisance and that all that the statute requires is that the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2. See O.C.G.A. § 16-15-7. Taken together, and pursuant to the motion to dismiss standard, the Court finds that Plaintiff has set forth sufficient allegations whereas, if proven to be true, a jury could find that Plaintiff would be entitled to the relief asserted in support of the complaint.

### **III. COUNT III and III: NEGLIGENCE PER SE - VIOLATION OF CITY OF BROOKHAVEN and DEKALB COUNTY NUISANCE CODES**

“Generally, negligence *per se* arises when a statute or ordinance is violated. The violation of certain mandatory regulations may also amount to negligence *per se* if the regulations impose a legal duty.” Schaff v. Snapping Shoals Elec. Mbrshp. Corp., 330 Ga. App. 161, 164, 767 S.E.2d 807 (2014), citing Norman v. Jones Lang Lasalle Americas, 277 Ga. App. 621, 627-628, 627 S.E.2d 382 (2006). Pursuant to O.C.G.A. § 51-1-6,

When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.

Id. In a negligence *per se* claim, assuming an ordinance has been violated, “a trial court must

consider: (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm the statute was intended to guard against. Finally, if the court finds negligence *per se*, the plaintiffs must then demonstrate a causal connection between the negligence *per se* and the injury.” Schaff, 330 Ga. App. at 164.

Here, Plaintiff has alleged that Defendants Star Residential and Terraces at Brookhaven had a duty to abide by Brookhaven and DeKalb County ordinances meant to protect the residents on their property, including Plaintiff. (See Second Amended Complaint.) These ordinances have identified illegal criminal activity as a nuisance and recognize that, like other nuisances, it is a blight on a property and community. (Id. at ¶¶ 38, 39, 50, 51). As such, the ordinances state that it is “the affirmative duty of the owner” of such properties to make sure that their buildings are compliant with ordinances designed to reduce such activity. (Id. at 39). Specifically, Dekalb County Ordinance § 18-2 provides:

Any dwelling, building, or structure used for prostitution, illegal gambling, or in connection with the commission of drug crimes is hereby declared to be a public nuisance. However, consistent with the public policy of the State of Georgia, this chapter shall not apply to any publicly owned cultural facility pursuant to O.C.G.A. § 41-1-8, as may hereinafter be amended. (b) It is the affirmative duty of the owner of every dwelling, building, or structure within unincorporated DeKalb County to construct and maintain such dwelling, building, or structure in conformance with applicable codes in the Official Code of Georgia, and all ordinances in force within unincorporated DeKalb County.

Cf. City of Brookhaven Ordinances § 16-23(a).

The motion to dismiss standard requires the Court to take the allegations in the Complaint as true. A review of the ordinances cited reflect that that property owners in DeKalb County and the city of Brookhaven have an affirmative duty to comply with county and city ordinances, including those designed to prevent illegal activity. Moreover, Plaintiff has set forth sufficient facts whereas a jury could find that Defendants have breached such duties, that Plaintiff falls within the



class of persons the ordinances were intended to protect, and that the harm complained of was the harm the ordinances were intended to guard against.

Based on the foregoing, Defendants Terraces at Brookhaven, LLC and Star Residential, LLC's Motion to Dismiss All Claims of Plaintiff's First Amended Complaint for Damages is hereby **DENIED**.

SO ORDERED, this 27<sup>th</sup> day of March, 2019.



---

Dax E. López, Judge  
State Court of DeKalb County

cc: All parties

STATE COURT OF