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Clerk of Superior Court
Chatham County
Date: 3/18/2022 1:29 PM
Reviewer: AB

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

CURTIS V. COOPER PRIMARY HEALTH CARE, INC., Plaintiff, v. ODC COF SAVANNAH, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY; ROW PINE DEVELOPMENT, LLC, A GEORGIA LIMITED LIABILITY COMPANY; 541 E BROUGHTON ST LLC, A GEORGIA LIMITED LIABILITY COMPANY; and GARY WIGGIN, Defendants.	)	Civil Action No. ~~SPCV20-00210-WA~~ SPCV22-00210-WA

BRIEF IN SUPPORT OF MOTION TO DISMISS AND DISSOLVE TEMPORARY RESTRAINING ORDER

Defendant ODC COF Savannah, L.L.C. ("ODC Savannah") submits this Brief in support of its Motion to Dismiss and Dissolve Temporary Restraining Order.

INTRODUCTION

The Petition filed by Plaintiff Curtis V. Cooper Primary Health Care, Inc. ("CVC" or "Plaintiff") fails to state a legally viable claim against ODC Savannah because CVC has never, at any time, held legally enforceable parking rights under the option agreement at issue. Accordingly, the Petition should be dismissed.

ODC Savannah is the fee simple owner of the parcel of property that is the subject of CVC's Petition ("Property"), which is adjacent to CVC's clinic. Petition ¶¶ 10, 13; Exs. A, B. While it is undisputed that ODC Savannah is the Property's rightful owner, the Petition asserts that CVC has certain parking rights on the Property, either (1) via an Option Agreement and Contract

for Purchase of Real Property ("Option Agreement") that it executed with City of Savannah ("City") in 2001, and/or (2) by virtue of prescriptive rights acquired by adverse possession. The Petition also seeks an injunction to prohibit or restrict ODC Savannah's use of Barr Street, a public street. Neither CVC's claims to parking rights on the Property nor its injunctive relief claim regarding Barr Street can withstand judicial scrutiny.

No Option Agreement Parking Rights. As a threshold matter, the Option Agreement's parking provisions—which are expressly conditioned on the City building a hypothetical parking garage that was never built—do not obligate the City to construct a parking garage or specify when the parking garage must be built. Accordingly, the parking provisions violate Georgia's statutory rule against perpetuities, and are void. In addition to violating the rule against perpetuities, the Option Agreement provides CVC with no parking rights on the Property as a matter of law for at least three reasons: (1) the Option Agreement's clear and unambiguous language provides that the City's construction of a parking garage was a condition precedent to CVC acquiring any parking rights on the Property, and no such construction ever occurred and the City has since sold the Property, (2) the City's statement "to endeavor" to provide alternative or temporary parking to CVC during the parking garage construction (if construction ever occurred) lacks consideration and is not a binding contractual promise, and (3) the Option Agreement is not binding on ODC Savannah as a grantee of the Property because the parking provisions did not concern the land or its use, and ODC was neither a party to nor assumed any obligations under the Option Agreement.

No Prescriptive Parking Rights. CVC's claim that it prescriptively acquired parking rights on the Property through adverse possession is also deficient as a matter of law for multiple, equally-dispositive reasons. First, any possession by CVC of the parking lot was expressly permitted by the Property's former owner—*i.e.*, the City—as evidenced by the Option Agreement.

Second, the requisite prescriptive period under Georgia law is 20 years, and the earliest date that CVC could have allegedly started adversely possessing the Property was less than 19 years ago, on July 30, 2003 when the City purchased the Property. Third, CVC cannot in any event claim prescriptive rights against the City as a government entity, so the period from 2003 to 2019 when the City owned the Property cannot be used to satisfy the statutory 20-year period. Fourth, CVC's alleged possession of the parking lot on the Property was not continuous and uninterrupted—indeed, CVC admits in the Petition that the parking lot was dug up and fenced off in 2020. Fifth, the Petition pleads no facts to demonstrate that CVC's alleged possession of the Property was exclusive only to it, its staff, and its patients.

No Rights to Prohibit or Restrict Barr Street Use. Finally, CVC's injunctive relief claim to prohibit or restrict ODC Savannah's use of Barr Street is without any legal support. CVC does not have—and it has never had—any private property rights in Barr Street, which is a public street. Therefore, CVC has no right or basis to prohibit or restrict ODC Savannah from using or improving Barr Street as part of its planned and permitted development project.

Because all claims asserted against ODC Savannah in the Petition fail as a matter of law, they should be dismissed with prejudice. By virtue of that dismissal, the Temporary Restraining Order entered by the Court on March 3, 2022 should be dissolved in its entirety without delay.

FACTUAL BACKGROUND

A. THE RELEVANT PARTIES

CVC is a Georgia not-for-profit corporation that provides health care services in Savannah, Georgia. Petition ¶ 1. CVC's clinic is located at 106 E. Broad Street, Savannah, Georgia 31401, which is directly across Barr Street from the Property. *Id.* ¶ 13.

ODC Savannah is Delaware limited liability company and fee simple owner of the Property. *Id.* ¶ 10; Ex. A. ODC Savannah is set to begin construction of a student housing apartment project on the Property.[1] Petition ¶ 28.

B. THE OPTION AGREEMENT

CVC[2] owned the Property at the time it entered into the Option Agreement with the City on December 30, 2001. Petition ¶ 15. Pursuant to the Option Agreement, the City acquired an option to purchase the Property from CVC, which it allegedly exercised on July 30, 2003. *Id*. ¶ 17; Ex. C.[3] The interpretation of certain parking-related provisions within the Option Agreement is the principal dispute in this lawsuit.

According to the Option Agreement, the City sought to "assemble several properties for the purpose of constructing a parking garage to serve downtown parking customers," and "the Property is one of the properties" that the City was seeking to assemble for this purpose. Option Agreement, Recitals. The Option Agreement provided the City with the "exclusive right and option" to purchase the Property, and City's stated intention therein was "to combine the Property with neighboring parcels for use as a site for a structure which will be used principally as a parking garage." *Id.* § 1.01. The purchase price of the Property was $355,200, calculated by taking the

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[1] Although the Petition generically references ODC Savannah's planned "construction of more than 100 residential units on the Property" (Petition ¶ 29), for the Court's information and reference, ODC Savannah's project is for the construction of a multi-family housing building (with potential renters to include students at the Savannah College of Art and Design) to be located on the Property and five adjacent parcels.

[2] CVC was formerly known as Westside Comprehensive Health Center, Inc. until 1981, when it changed its name to Westside-Urban Health Center, Inc. Petition ¶ 12. Westside-Urban Health Center, Inc. changed its name again in 2003 to its present name, Curtis V. Cooper Primary Health Care, Inc. *Id.* For the sake of simplicity, this memorandum only refers to CVC, even if the transaction or conveyance in question was conducted under one of CVC's prior names.

[3] The Option Agreement is attached to CVC's Petition as Exhibit C, but hereafter is cited to as "Option Agreement."

"[g]ross property value" of $425,200 less $70,000, described as the "avoided cost which Seller would incur to construct a surface parking lot on the Property containing 54 parking spaces meeting all applicable codes of the City." *Id.* § 2.01.

Section 3.01 of the Option Agreement is the source of CVC's purported parking rights at issue in this case, and provided as follows:

> 3.01 Purchaser to Make Garage Spaces Available to Seller. In consideration of the avoided cost component of the Purchase Price provided for in Section 2.01, **the Purchaser shall make available to the Seller fifty-four (54) spaces *in the Purchaser's parking garage constructed on the Property*. Said spaces shall be made available to the Seller at no additional cost for a period of twenty (20) years *commencing upon completion of the garage construction***. During a subsequent twenty (20) year period, the Purchaser shall make available to the Seller the fifty-four (54) spaces at the then prevailing parking space rate. Seller's access to the spaces shall be governed by the general rules established by the City for the operation of the parking garage. The spaces made available hereunder shall be used as employees, agents, sub-contractors, or clients of the Seller, and may not be sold, sub-leased or otherwise exchanged for value, financial or in-kind by the Seller to a third party. **Spaces shall be made available hereunder *only so long as the structure is usable as a parking garage.***

Option Agreement, § 3.01 (emphasis added) (underlining in original). Section 3.03 of the Option Agreement, entitled "Alternative Parking," stated that "***[d]uring the construction of the parking garage***, the Purchaser ***will endeavor*** to provide 54 parking spaces for use by the Seller." *Id*. § 3.03 (emphasis added). Neither Section 3.01 nor 3.03 (nor any other provision in the Option Agreement, for that matter) obligated the City to construct a parking garage. The parking rights granted to CVC in the Option Agreement would be triggered only upon the City's completion of the parking garage; if the City did not construct the parking garage, no parking rights accrued.

CVC alleges that the City exercised its option to purchase the Property on July 30, 2003. Petition ¶ 17. The "Closing Statement" for the City's purchase of the Property noted the following:

> As part of the consideration of this sale, the Option Agreement dated December 30, 2001, between the parties is by reference incorporated herein and made a part hereof. The terms and conditions contained therein in Article 3, Additional Terms and Conditions, Paragraphs 3.01, 3.02 and 3.03 shall survive the closing, shall

> remain enforceable until fully performed as required under such Agreement, and shall not merge upon the delivery of the Warranty Deed.

Id. ¶ 18; Ex. D, pg. 2. There are no allegations in the Petition that the Option Agreement or the Closing Statement were ever recorded. *See generally* Petition. At or after the City purchased the Property, a portion of the Property was paved and contained approximately 54 parking spaces that CVC could utilize for parking. *Id.* ¶ 19.

C. SUBSEQUENT TRANSFERS OF THE PROPERTY

The City owned the Property for more than 16 years after purchasing it in 2003. *See* Petition ¶¶ 18-20. There is no allegation in the Petition that the City, during the time it owned the Property, was required to construct, or ever constructed, a parking garage or permanent parking facility on the Property. *See generally* Petition. On December 20, 2019, the City entered into a "Deed of Exchange" with Defendant Row Pine Development, LLC ("Row Pine Development") in which Row Pine Development conveyed certain properties to the City in exchange for the City conveying the Property (and other properties) to Row Pine Development. Petition ¶ 20; Ex. E. The Deed of Exchange did not contain any express references to, or assumption of, the Option Agreement. Petition ¶ 21; Ex. E at 5. On the contrary, the Deed of Exchange merely referenced that the conveyance would be subject "[(1)] all valid restrictions, easements and rights of way of record, and [(2)] to any unrecorded contracts, agreements, easements and licenses, if any, **for *temporary parking* as previously disclosed by Part of the First Part to Party of the Second Part**." *Id*. (emphasis and bracketed information added).

In 2020, Row Pine Development removed and dug up the paved portion of the Property, thereby "making it impossible to use for parking" by CVC. Petition ¶¶ 23, 31. Around this same time, Row Pine Development also put a fence around the Property, "preventing [CVC's] access to the Property." *Id.* ¶ 31.

On June 8, 2020, Row Pine Development conveyed the Property to Defendant 541 E Broughton St. LLC ("541 E Broughton") via limited warranty deed. *Id.* ¶ 24; Ex. F. Like the City's previous conveyance to Row Pine Development, the limited warranty deed conveying the Property to 541 E Broughton did not contain any references to, or assumption of, the Option Agreement. *See generally id*. Rather, like the 2019 Deed of Exchange, this 2020 limited warranty deed contained only a perfunctory reference that the Property was subject to "all valid restrictions, easements and rights of way of record, and to any unrecorded contracts, agreements, easements and licenses, if any, **for *temporary parking* as previously disclosed by Grantor to Grantee**." Petition ¶ 24; Ex. F (emphasis added).

On February 4, 2022, 541 E Broughton conveyed the Property via limited warranty deed to ODC Savannah. Petition ¶ 25; Ex. G. This 2022 deed contained no references to, or assumption of, the Option Agreement. *See generally id.* CVC also admits that the 2022 deed contained no reference to any "temporary parking" like the above-referenced 2019 Deed of Exchange or the 2020 deed. Petition ¶ 26, Ex. G.

D. ALLEGATIONS REGARDING PARKING AND BARR STREET

CVC claims that ODC Savannah "plans to construct residential units on the Property and make no provision for the Property to be used for parking by [CVC]." Petition ¶ 28. CVC further alleges that ODC Savannah "is about to begin construction of the more than 100 residential units on the Property and that it intends to block access to the entirety of Barr Street during construction." *Id.* ¶ 29. Barr Street is allegedly "the primary access to [CVC's] primary clinic and health care facility," and CVC claims that the "blocking of Barr Street" will cause the access of patients and "emergency vehicles such as ambulances" to "be severely hindered." *Id.* The Petition

contains no allegations or supporting documentation that CVC has any claim of right or private property rights to Barr Street, which is a public street.[4] *See generally* Petition.

STANDARD OF REVIEW

A trial court should grant a motion to dismiss when, assuming the allegations in the Complaint are true, the plaintiff would not be entitled to relief under the facts as stated, and the defendant demonstrates that the plaintiff could not introduce evidence that would justify granting the relief sought. *See Mabra v. SF, Inc.*, 316 Ga. App. 62, 62 (2012) (affirming dismissal under O.C.G.A. § 9-11-12(b)(6)); *Blockbuster Investors L.P. v. Cox Enters., Inc.*, 314 Ga. App. 506, 506 (2012) (same). A Complaint may be dismissed whenever it lacks merit, and "this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." *Mabra*, 316 Ga. App. at 66.

When considering a motion to dismiss, courts construe pleadings most favorably to the party who filed them, and treat as true the complaint's factual allegations. *Id.* at 62, 65. But, ***when, in the absence of specifically pleaded facts, the plaintiff asserts what amounts to a legal conclusion couched as fact, the trial court is not required to accept that conclusion as true.*** *Id.* at 65 (emphasis supplied).

[4] ODC Savannah respectfully requests that the Court take judicial notice of the fact that Barr Street is a public street. *See* OCGA § 24-2-201(b)(1)-(2) (providing that judicial notice may be taken of facts that are "not subject to reasonable dispute" that are "[g]enerally known within the territorial jurisdiction of the Court" or are "[c]apabable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

ARGUMENT AND CITATIONS TO LEGAL AUTHORITIES

I. CVC'S CLAIM TO PARKING RIGHTS UNDER THE OPTION AGREEMENT FAILS AS A MATTER OF LAW

A. The Option Agreement's parking provision violates the rule against perpetuities and is void as a matter of law

An option agreement related to real estate may reserve certain rights to land "within a specified time," however, an option related to a real estate interest "which is unlimited as to time within which the option may be exercised constitutes a perpetuity" that is prohibited under Georgia's Statutory Rule against Perpetuities (the "Rule"). *Owenby v. Holley*, 256 Ga. App. 13, 15 (2002). Specifically, the Rule provides that a "nonvested property interest" is invalid unless: (1) when the interest is created, it is certain to either vest or terminate of an individual then alive or within 21 years after the death of an individual, or (2) the interest either vests or terminates within 360 years after its creation. O.C.G.A. § 44-6-201(a)(1)-(2); *see also Thomas v. Murrow*, 245 Ga. 38, 39 (1980) (finding option to repurchase land conditioned on whether a cotton gin ever ceased operating violated the Rule "because the cotton gin conceivably may not cease operations" until after the set statutory period limitation); *Gearhart v. W. Lumber Co.*, 212 Ga. 25, 25 (1955) (ruling that a deed containing a repurchase option if the property was ever not "used for county school" was void as "violative of the rule against perpetuities"). The Rule is an expression of public policy as determined by the legislature. *Murrow*, 262 S.E.2d at 80.

Here, the Option Agreement is void as a matter of law because it violates the Rule. In the Option Agreement, the City stated it would provide 54 parking spaces to CVC in the "parking garage constructed on the Property . . . commencing upon completion of the garage construction." Option Agreement, § 3.01. The Option Agreement also expressly conditioned that the City's obligation to provide CVC parking spaces was "only so long as the structure is usable as a parking garage." *Id.* It is undisputed, however, that the Option Agreement does not obligate the City to

construct a parking garage at all, much less provide a time specification as to when the City must construct the parking garage. Nor does the Option Agreement provide that the parking rights associated with any to-be-constructed parking garage will vest or terminate within the lifetime of an individual and/or within 360 years. In fact, as demonstrated by the Petition's allegations, the City never constructed a parking garage on the Property and then conveyed the Property to Row Pine Development in December 2019—*i.e.*, 16 years after purchasing the Property in 2003. Thus, nearly 20 years after the Option Agreement's execution in 2001, the City was no longer the fee owner of the Property after **never** constructing the parking garage, which confirms that CVC's parking rights will never vest or terminate within the time period required by Rule. As such, the Option Agreement violates the Rule and is, therefore, void as a matter of law.

B. The Option Agreement's clear and unambiguous terms preclude CVC's claim to parking rights thereunder

If the language of a contract is clear and unambiguous, "the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning." *Holcim (US), Inc. v. AMDG, Inc.*, 265 Ga. App. 818, 820 (2004). "The cardinal rule of contract construction is to ascertain the intention of the parties." *Nguyen v. Talisman Roswell, LLC*, 262 Ga. App. 480, 482 (2003). Construction of a contract, at the outset, is a question of law for the court. *Holcim (US), Inc.*, 265 Ga. App. at 820. "A condition precedent must be performed before the contract becomes absolute and obligatory upon the other party. Until compliance with this condition precedent the contract is not enforceable." *Hunt v. Thomas*, 296 Ga. App. 505, 509 (2009) (finding a breach of contract claim failed as a matter of law because "the house was not completed at the relevant time" which was a condition precedent to the contract, and therefore, the "obligation to purchase never matured").

Here, CVC's claim to parking rights at the Property are precluded by the Option Agreement's clear and unambiguous language. As set forth above, CVC's alleged parking rights on the Property under the Option Agreement (1) are expressly conditioned and would arise only "upon completion of the garage construction" and (2) would remain "available . . . only so long as the structure is usable as a parking garage." Option Agreement, § 3.1. Thus, like the house in *Hunt*, the City's construction of a usable parking garage on the Property was an express condition precedent that must have occurred before any alleged rights for CVC to park at the Property arose. The Petition contains no allegations that the City ever commenced, much less completed, construction of any parking garage on the Property—because it is undisputed that no construction ever occurred. Thus, under the Option Agreement's clear and unambiguous terms, CVC's parking claims are not enforceable, as a matter of law.[5]

C. The Option Agreement's provision for the City to "endeavor" to provide alternative or temporary parking is unenforceable

"It is axiomatic in the law of contracts that there must be a consideration moving the parties thereto . . . Among the considerations recognized by law as sufficient to support a contract is that of mutual promises, or, as it is sometimes termed, a promise for a promise." *Pabian Outdoor-Aiken, Inc. v. Dockery*, 253 Ga. App. 729, 729 (2002) (internal quotations and citations omitted). A promise, however, is "not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." *Id.* (finding a tenant's ability to terminate lease at any time meant that the tenant's consideration to remain in the lease and pay rent was an "illusory promise" and therefore lacked

[5] Similarly, any rights for CVC to "[a]lternative" or temporary parking were only to be provided "[d]uring the construction of the parking garage." Option Agreement, § 3.03. Therefore, commencement of construction of the parking garage was a condition precedent to any alleged rights to alternative or temporary parking. This provision also fails for lack of consideration. *See infra* Section II.C.

consideration); *see also Morrow v. So. Express Co.*, 101 Ga 810, 811-812 (1897) (holding a dairy transport contract lacked mutuality of consideration when the shipper did not undertake or bind himself to make any shipments); *Nat'l Surety Co. v. City of Atlanta*, 151 Ga. 123 (1921) (explaining that a contract for the continuing purchase of goods which gave the purchaser the right at any time to suspend deliveries was not binding).

Section 3.03 of the Option Agreement, entitled "Alternative Parking," states that "[d]uring the construction of the parking garage, the Purchaser [City] will ***endeavor*** to provide 54 parking spaces for use by the Seller." Petition, Ex. C § 3.03 (emphasis added). The common definition of "endeavor" is "[t]o exert physical or intellectual strength toward the attainment of an object or goal." ENDEAVOR, Black's Law Dictionary (11th ed. 2019). In other words, the City promised in Section 3.03 to ***try*** or ***attempt*** to provide alternative/temporary parking for CVC during construction of the parking garage—which construction, again, never happened. In other words, the City's promise to try or attempt to provide alternative or temporary parking during construction (if and when construction occurred) is not a promise to actually provide parking—in reality, it is not a binding promise to do anything. Accordingly, Section 3.03 of the Option Agreement relating to alternative or temporary parking fails as a matter of law for lack of consideration.

D. The Option Agreement is not binding on ODC Savannah as a subsequent grantee of the Property

"It is the general rule that the owner of land has the right to use it for any lawful purpose, and restrictions upon its use must be clearly established and strictly construed." *Copelan v. Acree Oil Co.*, 249 Ga. 276, 278 (1982) (quotation and citation omitted). Doubt as to restrictions and use will be construed in favor of the grantee. *See, e.g.*, *Voyles v. Knight*, 220 Ga. 305 (1964). "Underlying this rule is the sound policy that land use must be governed by its present owners, and should be subjected only in severely restricted circumstances to control by former owners" so

as to prevent diminishing or destroying "the utility of real property for . . . decades." *Copelan*, 249 Ga. at 278. For a covenant concerning land to be binding on subsequent grantees, a claimant must establish that (1) the covenant concerns the land or its use, and (2) the subsequent grantee has notice of the covenant. *Hayes v. Lakeside Vill. Owners Ass'n, Inc.*, 282 Ga. App. 866, 867-68 (2006). The Petition fails to plead any facts to show that either requirement can be satisfied such that Option Agreement is binding on ODC Savannah as a subsequent grantee of the Property.

First, the Option Agreement's parking provisions do not "concern the land or its use." A covenant must "concern the land or its use" in order to be binding upon subsequent grantees. *Hayes*, 282 Ga. App. at 867. For a covenant to "concern the land or its use," the prior property owner must actually create an "interest in land" by conveying the right of occupancy or control of the land to the grantee, while at the same time, the previous owner cannot retain "the full enjoyment of the property." *Sewell v. OK Oil, Inc.*, 203 Ga. App. 701, 703 (1992). For example, a gas station's agreement termed a "lease" to only sell a certain distributor's petroleum products while the property operated as a gas station did not concern the land because "no estate for years and no interest in land [had been] created" by the agreement and the gas station retained the full enjoyment of the property. *Copelan*, 249 Ga. at 278.

Likewise, here, the Option Agreement's parking provision did not "concern the land or its use" because it did not convey any interest in, or right of occupancy to, *the Property*. Instead, the Option Agreement granted to CVC the potential future right to use 54 spaces in a hypothetical, to-be-constructed parking garage only when and if the City built the same—which it never did. Other than granting the potential future right to use 54 spaces in the hypothetical, to-be-constructed parking garage, the Option Agreement makes clear that the City retained the "full enjoyment of the [P]roperty." Additionally, the Property was only one of "several properties" the City was

assembling for the purpose of constructing a parking garage; therefore, the parking garage could have been located on one or more of several other properties (and not necessarily situated on the Property). *See* Option Agreement, Recitals. Therefore, the Option Agreement's parking provisions do not concern the land and, thus, are not binding on ODC Savannah as a subsequent grantee.

Second, ODC Savannah is indisputably not a party or subject to the Option Agreement. Where a contract or undertaking is personal, it binds only the original parties and those who may assume the obligation or ratify or adopt the contract. *Sims v. Bayside Cap., Inc.*, 327 Ga. App. 47, 53 (2014). Because, as explained above, the Option Agreement did not concern the land or its use, it created personal obligations between only the parties thereto—*i.e.*, the City and CVC. There are no allegations in the Petition that the City's contractual obligations in the Option Agreement were assigned to or assumed by ODC Savannah—because they were not. Accordingly, ODC Savannah is not bound by any of the Option Agreement's terms or obligations.

II. CVC'S CLAIM AS TO PRESCRIPTIVELY-OBTAINED PARKING RIGHTS FAILS AS A MATTER OF LAW

Under Georgia law, the essential elements of a claim for prescriptive title/rights are that possession is (1) public, (2) continuous, (3) exclusive, (4) uninterrupted, (5), accompanied by a claim of right, and (6) not originating in fraud. *Walker v. Sapelo Island Heritage Auth.,* 285 Ga. 194, 196(2), (2009); O.C.G.A. § 44-5-161(a). A claim of right is synonymous with a claim of ownership, and "will be presumed from the assertion of dominion, particularly where the assertion of dominion is made by the erection of valuable improvements." *Cong. St. Props., LLC v. Garibaldi's, Inc.*, 314 Ga. App. 143, 145 (2012) (citation and quotation omitted). However, "[p]ermissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party." O.C.G.A. § 44-5-161(b); *see also W.U. Tel. Co. v. Atlanta & W.P.R. Co.*, 243 F. 685, 686 (N.D. Ga. 1917), *aff'd sub nom. W. Union Tel Co v. Atlanta & W P R*

Co, 250 F. 208 (5th Cir. 1918) (holding that the occupancy of the telegraph company of defendant's right was permissive, and not adverse, so there was no adverse possession). The party claiming prescriptive title has the burden of proving, by a preponderance of the evidence, possession in conformance with the above elements for a period of 20 years. *Walker*, 285 Ga. at 196; O.C.G.A. § 44-5-163. Claimants are statutorily prohibited from obtaining prescriptive rights through adverse possession against a government entity. O.C.G.A. § 44-5-163.

While it is unclear whether CVC claims parking rights to the Property by virtue of prescriptive title/adverse possession, the Petition generally alleges that CVC's "parking was open and obvious" at the Property. Petition ¶ 22; *see also id*. ¶ 39. Regardless, any claim that parking rights have been prescriptively established in CVC's favor on the Property by CVC fails for numerous independent and dispositive reasons.

First, pursuant to CVC's own allegations in the Petition, CVC and the City entered into the Option Agreement, and at or after City purchased the Property on July 30, 2003, the Property was paved such that CVC could and did use 54 or more parking spaces. Petition ¶ 19. Accordingly, at its core, CVC's parking at the party was a "[p]ermissive possession" explicitly allowed by the City, and thereby, not accompanied by a claim of right. *See* O.C.G.A. § 44-5-16(b).

Second, regardless of the permissive nature of CVC's use of the Property, its use has not extended for the requisite 20-year period. It is undisputed that the City purchased the Property on July 30, 2003. *See* Petition ¶ 19. Therefore, the earliest date on which CVC could have started to adversely possess the Property was July 30, 2003, which means that the 20-year prescriptive period does not run until **July 30, 2023**, which is still over a year away.

Third, as a matter of law, CVC cannot adversely possess property owned by a government entity. *See* O.C.G.A. § 44-5-163. The City owned the Property for a majority of the relevant time

period from July 30, 2003 to December 20, 2019. *See* Petition ¶ 20). No portion of that period can be used to satisfy the prescriptive period, leaving CVC well short of satisfying the 20-year requirement.

Fourth, CVC's possession of the Property was not continuous or uninterrupted for the 20-year statutory period. To the contrary, CVC acknowledges and admits in the Petition that Row Pine Development dug up the pavement and placed a fence around the former parking lot that prevented CVC's access of the Property in 2020. Petition ¶ 31.

Fifth, the Petition does not allege that CVC's possession of the Property was exclusive, in that only CVC's patients and/or employees used the previous parking lot at the Property. *See generally* Petition. To be sure, publicly-available information shows that the City used the parking spaces claimed by CVC, as well.[6] The absence of exclusive possession defeats any claim of prescriptive rights to the Property.

For all of the above reasons, CVC clearly cannot satisfy most of the adverse possession elements required to obtain prescriptive rights or title to the Property. Accordingly, the Court should dismiss CVC's claim premised on prescriptive rights as a matter of law.

III. CVC'S CLAIM TO PRECLUDE OR RESTRICT ODC SAVANNAH'S USE OF BARR STREET FAILS AS A MATTER OF LAW

The Petition does not allege that CVC has any exclusive property rights as it relates to Barr Street. Nor can it, because Barr Street is a public street. For this reason, CVC is estopped from

[6] *See, e.g.*, https://www.savannahnow.com/story/entertainment/holiday/2017/02/24/savannah-selling-advance-parking-st-patrick-s-day/13894926007/ (last visited March 17, 2022) ("Beginning at 8 a.m. on Monday, Savannah's Mobility & Parking Services department will begin selling parking spaces for the St. Patrick's Day celebration on March 16-19. The pre-sale includes parking spaces at two locations . . . Curtis V. Cooper Parking Lot - located at 122 Barr Street (between East President Street and East Broughton Street). Directly behind the Curtis V. Cooper Primary Health Care Center. There are 53 parking spaces available to be purchased . . . ."

claiming it gained any exclusive rights to Barr Street by adverse possession, as a party cannot claim prescriptive title against property owned by a government entity. O.C.G.A. § 44-5-163. Accordingly, CVC cannot claim any possessory property rights to prohibit or restrict ODC Savannah from using, improving, and/or limiting access to Barr Street, all of which ODC Savannah will perform pursuant to duly-issued permits and direction obtained from the City.

CONCLUSION

For all the reasons stated above, the Court should dismiss all claims in CVC's Petition against ODC Savannah in their entirety and with prejudice. With the dismissal of all claims against ODC Savannah, the March 3, 2022 temporary restraining order should also be immediately dissolved.

Respectfully submitted, this 18th day of March, 2022.

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IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

CURTIS V. COOPER PRIMARY HEALTH CARE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. ~~SPCV20-00210-WA~~ SPCV22-00210-WA
ODC COF SAVANNAH, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY; ROW PINE DEVELOPMENT, LLC, A GEORGIA LIMITED LIABILITY COMPANY; 541 E BROUGHTON ST LLC, A GEORGIA LIMITED LIABILITY COMPANY; and GARY WIGGIN,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief in Support of Motion to Dismiss and Dissolve Temporary Restraining Order** has this date been served on all parties by Statutory Electronic Service as follows:

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