

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GEORGIACARRY.ORG, INC., and)	
PHILLIP EVANS,)	
)	
Plaintiffs,)	Civil Action No.:
)	
v.)	2014-CV-253810
)	
THE ATLANTA BOTANICAL)	
GARDEN, INC.,)	
)	
Defendant.)	
_____)	

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND
JUDGMENT IN FAVOR OF DEFENDANT**

On July 16, 2020, Plaintiffs GeorgiaCarry.org, Inc. and Phillip Evans (“Plaintiffs”) filed a Motion for Summary Judgment. On July 17, 2020, Defendant Atlanta Botanical Garden, Inc. (the “Garden”) filed a Motion for Summary Judgment. The Parties filed additional response and reply briefing, and on October 8, 2020 this Court held a hearing on the Cross-Motions for Summary Judgment. Having considered the Parties’ briefs and the arguments of counsel for both sides, the Court finds the following:

I. PROCEDURAL HISTORY

1. Plaintiffs commenced an action seeking declaratory and injunctive relief, seeking a declaration that the Garden may not prohibit people with Georgia

Weapons Carry Licenses (“GWLs”) from carrying weapons on property the Garden leases from the City of Atlanta. The Garden filed a motion to dismiss. This Court granted Defendant’s motion to dismiss.¹

2. The Supreme Court of Georgia reversed, ruling that the trial court erroneously dismissed the case, and specifically that a declaratory judgment action is an available remedy to test the validity and enforceability of a statute where an actual controversy exists. *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 299 Ga. 26 (2016) (“GeorgiaCarry.Org I”).

3. On remand, this Court converted the Garden’s Motion for Judgment on the Pleadings to a motion for summary judgment and granted judgment in favor of the Garden.

4. The Court of Appeals affirmed. *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 345 Ga. App. 160 (2018) (“GeorgiaCarry.Org II”).

5. The Supreme Court reversed again. *GeorgiaCarry.Org., Inc. v. Atlanta Botanical Garden, Inc.*, 834 S.E.2d 27 (2019) (“GeorgiaCarry.Org III”). The Court ruled that the entire case turns on whether the Garden’s interest in the property at issue is a usufruct or an estate for years. Because the lease documents were not part of the record, the Court was not able to make that determination. The Court remanded for an analysis of the lease to determine if there is a usufruct or an estate

¹ The previous dispositive orders were not entered by the undersigned Judge.

for years. This matter having now come before the undersigned Judge, this Court finds as follows:

II. FINDINGS OF FACT

1. Plaintiff Phillip Evans (“Evans”), after being escorted off of the premises while visiting the Garden with his family and openly carrying a firearm, emailed the president and CEO of the Garden, Mary Pat Matheson to clarify the Garden’s weapons policy. Affidavit of Phillip Evans. Matheson responded that the Garden prohibits weapons except in the possession of police officers. *Id.*, ¶ 13.

2. The Garden is a private, non-profit corporation organized under the laws of the State of Georgia. (Compl. ¶ 2).

3. The Garden operates on land that it leases from the City of Atlanta. (Compl. ¶ 4).

4. The current version of the lease between the Garden and the City of Atlanta was executed on August 17, 2017. July 2, 2020 Stipulation; Exhibit A at 1.

5. The terms of the lease agreement convey the botanical garden property from the City of Atlanta to the Garden for a term of fifty years. Exhibit A at 4-5.

6. The lease states that it conveys a “leasehold estate” (Section 12.4) and a “leasehold interest” (Section 3.4). Exhibit A at 5, 19.

7. The lease defines the “Lessor” as “the City and all successors and assigns of the reversionary interest” in the premises (Section 1.13). Exhibit A at 3.

8. The lease states that it conveys the “Demised Premises” to the Garden, including the air rights over the property (Section 2.5). Exhibit A at 5.

9. The lease grants the Garden “exclusive control and management” of the botanical garden property (Section 5.5) and grants the Garden the right of quiet enjoyment (Section 3.1). Exhibit A at 5, 6.

10. The lease allows the Garden to exclude “any objectionable person or persons” from the botanical garden property (Section 5.7). Exhibit A at 6.

11. The Garden has leased the botanical garden property from the City of Atlanta since 1980. Affidavit of Mary Pat Matheson, Exhibit B at ¶ 2.

12. The Garden’s lease with the City of Atlanta requires that the Garden be developed under the “Master Plan” attached to the lease.

13. The most recent version of that Master Plan, created in 2002, was entirely developed and designed by the Garden with no input or revisions from the City of Atlanta. Affidavit of Mary Pat Matheson, Exhibit B at ¶ 4.

14. The Garden’s exclusive control and management over the property includes absolute control over admission prices, operating hours, exhibits, performances, business operations, and who can be admitted to or excluded from the property.

III. CONCLUSIONS OF LAW

The Garden may exclude or eject persons in possession of a gun under O.C.G.A. § 16-11-127(c) because the Garden holds an estate for years under its lease with the City of Atlanta and, therefore, the botanical garden property is private property under Georgia law.

A usufruct is created “when the owner of real estate grants to another person ... the right simply to possess and enjoy the use of such real estate....” O.C.G.A. § 44-7-1(a). A usufruct is a lesser interest in real estate than is an estate for years. *Searcy v. Peach County Board of Tax Assessors*, 180 Ga. App. 531 (1986).

An estate for years “carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use.” O.C.G.A. 44-6-103. Placing some limitations on the use of the estate does not reduce it to a usufruct. *State v. Davison*, 198 Ga. 27 (1944). But if the restrictions are so pervasive, they are fundamentally inconsistent with an estate for years. *Allright Parking of Ga., Inc. v. Joint City-county Board of Tax Assessors*, 244 Ga. 378 (1979).

Plaintiffs argue that the current lease is similar to the lease in *Diversified Golf v. Hart County Board of Tax Assessors*, 267 Ga. App. 8 (2004). The Garden argues

that the current lease is similar to the lease in *Jekyll Development Associates, L.P. v. Glynn County Board of Tax Assessors*, 240 Ga. App. 273 (1999).

Here, the Garden's lease carries the presumption that it creates an estate for years because of its 50-year term. *Eastern Air Lines, Inc. v. Joint City-County Bd. of Tax Assessors*, 253 Ga. 18 (1984) (holding that where "the term of a lease is for a period greater than five years, a rebuttable presumption arises that the parties intended to create an estate for years rather than a usufruct.")

To overcome the presumption of an estate for years, the terms of the Garden's lease would need to explicitly negate the presumption and demonstrate the parties' intent to create only a usufruct. *Camp v. Delta Air Lines, Inc.*, 232 Ga. 37 (1974). But a review of the Garden's lease shows a clear intent to create an estate for years, not a usufruct. The Garden's lease explicitly states that it creates a "leasehold estate" (Section 12.4), and grants the Garden "exclusive control and management" of the botanical garden property during the lease term (Sections 3.1; 5.5), including the authority to "exclude any objectionable person or persons from the Garden" (Section 5.7).

Plaintiffs contend that the lease's restrictions on the Garden's use of the botanical garden property are indicative of a usufruct, but, as explained by the Supreme Court of Georgia, "[a] contract which ordinarily would be construed to create an estate for years is not reduced to a mere usufruct because certain limitations

are put upon its use.” *Warehouses, Inc. v. Wetherbee*, 203 Ga. 483 (1948). Ultimately, the Garden’s lease is consistent with the lease found to create an estate for years by the Georgia Court of Appeals in *Jekyll Development*. And while both the Garden’s lease and the lease in *Jekyll* contained some restrictions more indicative of a usufruct than an estate for years, the restrictions in the leases do not “quantitatively or qualitatively outweigh the incidents of ownership vested in the lessee to convert the interest conveyed from the intended leasehold estate to a usufruct.” *Id.* at 277.

Accordingly, the Garden is in possession of an estate for years through its lease with the City of Atlanta and, therefore is an entity “in legal control of private property” and may exclude or eject individuals carrying a gun under O.C.G.A. § 16-11-127(c). It is therefore hereby **ORDERED** that Atlanta Botanical Garden, Inc.’s Motion for Summary Judgment is **GRANTED** and Plaintiffs GeorgiaCarry.org, Inc. and Phillip Evans’s Motion for Summary Judgment is **DENIED**.

JUDGMENT is hereby entered in favor of Defendant Atlanta Botanical Garden, Inc. and against Plaintiffs GeorgiaCarry.org, Inc. and Phillip Evans.

This 5th day of November, 2020.


The Honorable Rachelle Carnesale
Judge, Fulton County Superior Court

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