

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE ORCHARD PROPERTY OWNERS)	
ASSOCIATION II, INC.,)	
)	
Plaintiff,)	CIVIL ACTION FILE
)	NO. 2023CV382248
vs.)	
)	
HABERSHAM COUNTY, GEORGIA,)	
)	
Defendant.)	

MOTION TO TRANSFER FOR IMPROPER VENUE

NOW COMES Defendant Habersham County, Georgia, a political subdivision of the State of Georgia, and files this Motion to Transfer this action pursuant to Georgia Uniform Superior Court Rule 19.1 and shows the Court as follows:

I. BACKGROUND

Defendant Habersham County, Georgia is the owner of a certain parcel of real property known as Lot 20, Phase IX of the Orchard Subdivision located in Habersham County, Georgia. Habersham County intends on constructing a tower on said lot for use in its public safety communications system. Plaintiff The Orchard Property Owners Association II, Inc., the homeowners association for the Orchard Subdivision in Habersham County, Georgia, filed this action in the Superior Court of Fulton County on July 3, 2023 seeking permanent injunctive relief to prevent the County from erecting the tower.

For the reasons set forth herein, Habersham County moves this Court pursuant to Ga. Unif. Super. Ct. Rule 19.1 to transfer this action to the Superior Court of Habersham County, Georgia. In addition, Habersham County moves this Court for an award of attorneys' fees for bringing the motion pursuant to Ga. Unif. Super. Ct. Rule 19.1(F).

II. THIS COURT LACKS VENUE.

This case has nothing to do with Fulton County. The Plaintiff is a homeowners association for The Orchard subdivision in Habersham County. Its principal office and registered agent are located in Habersham County. The Defendant Habersham County is a political subdivision of the State of Georgia and does not conduct business in Fulton County. The property against which the Plaintiff seeks injunctive relief is in Habersham County. All of the witnesses who have knowledge of the facts at issue in this litigation are public officials of Habersham County, or individuals who reside in Habersham County. In a clear exercise of forum shopping, Plaintiff filed this action in this Court, asserting that venue is proper pursuant to O.C.G.A. § 50-21-1, which provides for venue in the Superior Court of Fulton County for contract disputes with state agencies. This is a covenant enforcement action, not a breach of contract action, and O.C.G.A. § 50-21-1 is not applicable to the claims asserted by the Plaintiff in the Complaint. This case belongs in the Superior Court of Habersham County.

A. The statute is not applicable where there is no written contract between the plaintiff and the state authority.

O.C.G.A. § 50-21-1 provides for the waiver of sovereign immunity in cases pertaining to disputes arising from written contracts between third parties and agencies or authorities of the State of Georgia. O.C.G.A. § 50-21-1 provides as follows:

- (a) The defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract existing on April 12, 1982, or thereafter entered into by the state, departments and agencies of the state, and state authorities.
- (b) Venue with respect to any such action shall be proper in the Superior Court of Fulton County, Georgia. The provisions of this subsection shall be cumulative and supplement to any other venue provisions permitted on April 12, 1982, or thereafter permitted by law.

By its express terms, O.C.G.A. § 50-21-1 only pertains to actions involving written contracts entered into with state authorities, and where no written contract exists between the parties, sovereign immunity is not waived, and the statute is not applicable. *Georgia Department of Labor v. RTT Associates, Inc.*, 299 Ga. 78, 786 S.E.2d 840 (2016) (general rules of contract law that might otherwise support a claim for breach of contract damages between private parties, however, will not support a claim against the state or one of its agencies if the contract is not in writing). The statute is subject to strict construction, and claims based upon quasi contractual claims, such as implied contracts and quantum meruit are not sufficient to trigger the waiver of sovereign immunity or the venue provision contained in the statute. See *PMS Construction Company v. DeKalb County*, 243 Ga. 870, 257 S.E.2d 285 (1979) (a party may not recover for breach of contract from a county based upon an implied contract, nor upon a claim of quantum meruit for the value of services provided, because of the statutory requirement that a contract with a county must be in writing); *Fedorov v. Bd. of Regents*, 194 F. Supp. 2d 1378, 1393-94 (S.D. Ga. 2002) (no liability as matter of law for Board of Regents on claim for breach of implied contract because the state is only subject to a lawsuit for breach of contract if the contract is in writing); *Bd. of Regents of Univ. System of Ga. v. Barnes*, 322 Ga. App. 47, 743 S.E. 2d 609 (2013) (an implied contract will not support a waiver under the sovereign immunity provisions of the Georgia Constitution).

No written contract was ever entered into between the Plaintiff and Habersham County. Plaintiff is a homeowners association seeking injunctive relief against the County based on alleged violations of (a) the restrictive covenants filed in the deed records for the Orchard Subdivision and (b) the Habersham County Code of Ordinances. (Complaint, ¶ 6). The Declaration of Covenants and Restrictions for the Orchard is dated November 21, 1988 and recorded in the deed records of

Habersham County in Deed Book 240, Page 419 (Complaint ¶ 4). In Paragraph 14.4, the Declaration provides that restrictions and covenants contained in the Declaration “shall run with the Property, shall be binding upon the Owners of any portion thereof, and shall inure to the benefit of Developer, the Association, and the Owners.” (Complaint, Ex. “A”). On October 5, 1999, Virgil E. Lovell, the developer of the Orchard subdivision, conveyed title to Lot 20, Phase IX of the Orchard subdivision to Habersham County by virtue of a certain “Deed for Public Use,” recorded in Deed Book 489, Page 910, Habersham County deed records. Plaintiff alleges that Lot 20 is “subject to all the terms, conditions, requirements and restrictions in the Declaration,” (Complaint, ¶ 15), and contends that Habersham County’s construction of a public safety communications tower violates the restrictive covenants.

Habersham County denies and disputes that the covenants restrict the County’s ability to use its property for public purposes. However, for purposes of determining venue, O.C.G.A. § 50-21-1 does not apply to restrictive covenants. The statute only applies to written contracts entered into with the governmental agency. The statute must be strictly interpreted by this Court, and case precedent holds that implied contracts do not trigger the statute. *PMS Construction Company v. DeKalb County*, 243 Ga. 870, 257 S.E.2d 285 (1979). Therefore, venue is not proper in this Court, and this case should be transferred to the Superior Court of Habersham County.

B. Georgia law requires actions arising in equity to be brought in the county of the defendant’s residence.

Plaintiff concedes in the Complaint that it has no adequate remedy at law and seeks the equitable remedy of injunctive relief. (Complaint, ¶ 58, 59). For equitable cases, the 1983 Constitution of the State of Georgia mandates that equitable actions be brought in the county of the defendant’s residence. Ga. Const. Art. VI, §II, Para. III provides: “Equity cases **shall** be tried

in the county where a defendant resides against whom substantial relief is prayed.” (emphasis added). Further, O.C.G.A. § 9-10-30 provides, in pertinent part, “All actions seeking equitable relief **shall** be filed in the county of the residence of one of the defendants against whom substantial relief is prayed.” (emphasis added). For venue purposes in determining residency of a state agency, in the absence of statutory direction, "residence" under the constitutional provisions must be determined based upon the general meaning of the term. *Hoffman v. Dep't. of Corr.*, 218 Ga. App. 363, 460 S.E.2d 882 (1995). In *Hoffman*, the Court of Appeals determined venue in an action for damages brought against the Georgia Department of Corrections to be in Fulton County, where the State Capitol and the seat of government is located. Habersham County's offices are maintained in Clarkesville, Habersham County, Georgia. Since Habersham County is the sole defendant in this case, venue is only proper in Habersham County.

O.C.G.A § 50-21-1(b) provides that the provision allowing venue in the Superior Court of Fulton County “shall be cumulative and supplement to any other venue provisions permitted on April 12, 1982, or thereafter permitted by law” (emphasis added). However, this subsection does not apply where there is a constitutional mandate regarding venue. In *Chancey v. Hancock*, 225 Ga. 715, 171 S.E. 2d 302 (1969), the Supreme Court ruled that a constitutional provision requiring venue for equitable actions in the county of the defendant's residence controls over a conflicting statutory provision. In *Chancey*, an action to enjoin a public nuisance was filed in Barrow County based on former code section 58-109, which permitted an action to enjoin a public nuisance to be brought in the county where the property is located. After the trial court granted injunctive relief, on appeal, the Supreme Court reversed the trial court and dismissed the action for lack of venue. The Court ruled that Art. VI, Sec. XIV, Par. III of the Georgia Constitution, requiring equitable

actions to be filed in the county of defendant's residence, controlled over the code provision allowing such actions to be filed in the county where the property is located.

Similarly, in *Hopkins v. Baker*, 258 Ga. App. 14, 572 S.E. 2d 716 (2002), the Court of Appeals reversed the trial court's denial of a motion to dismiss or transfer based on lack of venue in an action seeking injunctive relief. In *Hopkins*, the plaintiff filed suit against the defendant in Chattooga County, seeking injunctive relief for defendant's construction activities on certain land owned by the defendant in Chattooga County, and later added a claim for declaratory judgment regarding the ownership of the subject property. The defendant filed a motion to dismiss or to transfer the action to Floyd County, the county of the defendant's residence. The trial court denied the motion and granted an interlocutory injunction in favor of the plaintiff. The Court of Appeals reversed the trial court and determined the proper venue was in the county of defendant's residence pursuant to Ga. Const. Art. VI, § II, Para. III.

In the present case, the constitutional requirement that equitable actions be filed in the county of the defendant's residence controls over the conflicting provisions of O.C.G.A § 50-21-1(b). Plaintiff clearly filed this action in this Court in an intentional effort to keep this litigation out of the eyes of residents of Habersham County. O.C.G.A § 50-21-1(b) does NOT require this action to be filed in the Superior Court of Fulton County. In *Board of Regents of the University System of Georgia v. Winter*, 331 Ga. App. 528, 771 S.E.2d 201 (2015), overruled on other grounds by *Rivera v. Washington*, 298 Ga. 770, 784 S.E. 2d 775 (2016), the Court of Appeals expressly rejected the argument that breach of contract actions against the State of Georgia **are required** to be brought in the Superior Court of Fulton County. The communications tower is a critical component of Habersham County's emergency response system and will benefit all residents of Habersham County, including the residents of the Orchard subdivision. The system currently in

use is past its “end of life,” has large areas without coverage in northern Habersham County, and is seldom usable inside buildings in southern Habersham County cities. This system will provide essential coverage to law enforcement, public safety officials, school buses drivers (and the school system), emergency medical and fire services, and county departments. The new system is an integrated system requiring eight towers which are in “line of sight” to provide full functionality and coverage, and due to the mountainous sections of Habersham County, there is a limited area where these towers can be located. There are few locations which are suitable for the tower in Habersham County, and the County’s lot, which has been used for public purposes for many years, is the optimal location for both functionality and cost. The tower will have minimal impact, if any, on the residents of the subdivision but it is critical for the provision of emergency services for the benefit of the health, safety and welfare of **ALL** the citizens of Habersham County. If the Plaintiff seeks to enjoin this important public use of Habersham County’s property, this litigation should be prosecuted before the citizens of Habersham County in *their* county.

III. REQUEST FOR ATTORNEY’S FEES

Uniform Superior Court Rule 19.1(F) authorizes the award of attorney’s fees for bringing a Motion to Transfer. This case has absolutely nothing to do with Fulton County. This case does not involve a written contract entered into between the Plaintiff and Habersham County. Plaintiff intentionally filed this action in Fulton County in order to forum shop this litigation. Habersham County is entitled to an award of attorney’s fees for bringing this Motion.

WHEREFORE, Defendant prays that this Court enter an order (a) transferring this action to the Superior Court of Habersham County, Georgia; (b) awarding reasonable attorney’s fees to the Defendant, and (c) for such other and further relief as may be just and proper.

Respectfully submitted this 20th day of July, 2023.

/s/ Ralph L. Taylor, III

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a true and correct copy of the within and foregoing *Motion to Transfer for Improper Venue* upon opposing counsel by depositing a copy of same in the United States mail with sufficient postage affixed to the address set forth below:

William H. Gourley, III
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This 20th day of July, 2023.

/s/ Ralph L. Taylor, III
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