IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

MARTHA GOMEZ, **Plaintiff,** **v.** **FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN,** **Defendants.**	**Civil Action No.:** **4:24-cv-00099-WMR**

RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

COMES NOW, Marth Gomez, Plaintiff in the above styled action (hereinafter "**Plaintiff**" or "**Ms. Gomez**"), by and through her attorneys, and files her Response Brief in Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint showing the Court as follows:

I. STATEMENT OF FACTS

This action arises from the loss of a structure on Plaintiff's property. This structure was a metal detached garage located immediately adjacent to Plaintiff's house (the "Structure"). The Structure was Ms. Gomez's garage. [Doc. 7, ¶ 11]. The same is pictured below and was destroyed on or about April 1, 2023 when a tree fell on it.

[Doc. 7-5, p. 10]. At the time of the loss, Ms. Gomes had an insurance agreement, Policy No. 381-5009627105-02 (the "Policy"), with Foremost Insurance to insure her property located at 3743 Miller Dr. NE, Dalton, GA 30721. [Doc. 7, ¶ 6].

The Policy states that it provides coverage for "direct, abrupt, and accidental physical loss to the property described in Coverage A- Dwelling and Coverage B – Other Structures unless the loss is excluded elsewhere in this policy. A difference in physical appearance or inability to match existing property with property this has been or will be repaired or replaced is not a direct, abrupt, and accidental physical loss. [Doc 7-1, p. 4]. The Policy goes on to define the insured "Premises" as:

1. The dwelling that is described on the Declarations Page where you reside on the inception date of the Policy Period;
2. The other structures including sidewalks, driveways, or other private approaches that serve that dwelling; and
3. The grounds where that dwelling is located.

[Doc 7-1, p. 4.]. The Policy then goes on to state that the

> Premises does not mean:
> 1. Dwellings that are not described on the Declarations Page;
> 2. Other structures including sidewalks, driveways, or other private approaches, which solely serve a dwelling that is not described on the Declarations Page; or
> 3. The grounds that are immediately adjacent to dwellings that are not described on the Declarations Page even if located on the same parcel of land or at the same address as your dwelling described on the Declarations Page.

[Doc. 7, pp. 4-5.] The declaration page for the Policy lists the insured premises as 3743 Miller Dr. NE, Dalton, GA 30721. [Doc. 7, ¶10 and Doc. 7-2]. And that is the only description of the premises in the Policy. Id.

Based on the Policy and Ms. Gomez's belief that the Policy covered the Structure, she filed a claim with Defendant. [Doc. 7, ¶13]. Without formally denying the claim, Foremost Insurance notified Plaintiff that it would not pay for the damage to the structure, it would only pay for the contents inside the Garage. [Doc. 7, ¶14 and Doc. 7-4]. Plaintiff then hired counsel who sent a demand letter to Defendant demanding that it cover the loss, adjust the claim, and pay the loss within 60 days or that Ms. Gomez would pursue bad faith damages against Defendant. [Doc. 7 and Doc. 7-5]. In response to the demand letter, Defendant refused to adjust the claim and instead forwarded an incomplete and uncertified copy of the Policy. [Doc 7, ¶ 17 and Doc. 7-6]. In turn, Ms. Gomez reiterated her demand and provided Defendant with legal support for the same. Ms. Gomez's

demand was then denied with a citation to a Notice of Exclusion of Coverage for a Specific Structure. [Doc. 7 ¶¶ 18-20; Doc. 7-7; and Doc. 7-8]. This Notice of Exclusion of Coverage for a Specific Structure did not list a single separate structure that was excluded from coverage.

Important Notice
Exclusion of Coverage for a Specific Structure

Your insurance policy **EXCLUDES** coverage for a specific structure.

SPECIFIC STRUCTURE EXCLUSION

The structures described on this endorsement are excluded from all coverages provided in Section I Coverage B - Other Structures, and SECTION I Additional Coverages.

All other provisions of your policy apply.

Please read your policy for details.

If you have any questions about your policy, please contact your Foremost representative. Your representative will be happy to review your policy with you. You'll find your representative's name and address listed on the Declarations Page of your policy.

Thank you for choosing a Foremost policy. We appreciate your trust and confidence.

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[Doc. 7, ¶ 21 and Doc. 7-8].

II. STADNARD OF REVIEW

The Federal Rules of Civil Procedure require a plaintiff's complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). The federal courts, through Iqbal and Twombly, have clarified this pleading standard to require a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible

on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). However, this does not require the complaint to "specify in detail the precise theory giving rise to recovery. All that is required is that the defendant be on notice as to the claim being asserted against him and the grounds on which it rests." Sams v. United Food & Commercial Workers International Union, AFL–CIO, CLC, 866 F.2d 1380, 1384 (11th Cir.1989); Evans v. McClain of Georgia, Inc., 131 F.3d 957, 964 n. 2 (11th Cir.1997) (quoting Sams, 866 F.2d at 1384); Plumbers & Steamfitters Local 150 v. Vertex Constr., 932 F.2d 1443, 1448 (11th Cir.1991) (same).

Further, when ruling on a motion to dismiss, the court must take all factual allegations in the complaint as true and construe all facts and inferences in the light most favorable to the plaintiff. Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000) and Williams v. Alabama State Univ., 102 F.3d 1179 (11th Cir. 1997).

Additionally, in the

III. ARGUMENT WITH CITATION TO AUTHORITY

a. As Defendant's Motion requires determinations of fact, it is for determination by a jury.

Defendant's Motion [Doc. 12] must be denied as it revolves around the factual determination of whether a structure is considered part of the dwelling.

The U.S. Const. amend. VII establishes a blanket right for a trial by jury in common law cases exceeding twenty dollars. U.S. Const. amend. VII. The Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions. Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, (1962) (quoting Byrd v. Blue Ridge Rural Elec. Cooperative, 356 U.S. 525, 538-539 (1958)). Further, a claim for breach of contract is a common law claim that entitles the plaintiff to a trial by jury. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962). Additionally, in the cases of insurance bad faith, the courts are to leave questions of bad faith to the jury. Henderson v. Georgia Farm Bureau Mut. Ins. Co., 328 Ga. App. 396, 762 S.E.2d 106 (2014) ("The question of bad faith is generally for the jury").

In this action, Plaintiff has asserted a common law claim and properly demanded a trial by jury. As such, all questions of fact must be left to the jury. The determination of factual questions by anyone other than a jury will be a violation of Plaintiff's seventh amendment rights. In this case, Defendant's Motion [Doc. 12] asks for this Court to make several determinations of fact. First, Defendant wants this Court to make the factual determination that the Structure is not part of the dwelling. Next, Defendant wants this Court to make the factual determination that it did not act in bad faith and that its interpretation of the Policy was

reasonable. All of which are factual determinations that must be left to a jury. As such, Defendant's Motion [Doc. 12] must be denied.

b. As the structure is a garage, immediately adjacent to the main structure, and used in connection with the main structure, it is part of the dwelling and covered by the Policy.

Assuming for arguendo only, that the questions of fact raised on Defendant's Motion [Doc. 12] do not require jury determination, Defendant's Motion [Doc. 12] must still be dismissed as the garage is part of the dwelling.

i. As the Policy was made and delivered in Georgia, Georgia law must be used to interpret the Policy.

The first step in contract interpretation in a case in federal court on diversity jurisdiction is to determine what law applies. And pursuant to Erie R. Co. v. Tompkins and its prodigy, the court is to apply the conflict of laws provisions of the state in which it sits, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). And in this case, that is Georgia. Georgia follows the rule of *lex loci contractus* which mandates that "the validity, nature, construction, and interpretation of a contract are governed by the substantive law of the state where the contract was made." Lloyd v. Prudential Securities, Inc., 211 Ga. App. 247, 248, 438 S.E.2d 703, 704 (1993) see also Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405 (11th Cir. 1998). Specifically for insurance contracts, Georgia looks at the place where the contract was made to determine which states laws will be used to interpret the insurance contract. Lima Delta Co. v. Glob. Aerospace, Inc., 325 Ga.

App. 76, 752 S.E.2d 135 (2013) citing Fed. Ins. Co. v. Nat'l Distributing Co., 203 Ga. App. 763, 767(1), 417 S.E.2d 671 (1992) ("insurance contracts often have no particular place where performance is contemplated," Georgia generally applies "the law of the place where the contract was made"). To determine where the insurance contract was made, Georgia looks at where the insurance policy was applied for, paid for, and delivered. See Gen. Telephone Co. of Southeast v. Trimm, 252 Ga. 95, 96, 311 S.E.2d 460 (1984) (under *lex loci contractus*, a contact is made in Georgia where the "last act essential to the completion of the contract" was performed in this State). See also Gen. Elec. Credit Corp. v. Home Indem. Co., 168 Ga. App. 344, 350, 309 S.E.2d 152 (1983) (an "insurance contract is constructively made at the place where the contract is delivered").

In this case, the Policy was applied for in Georgia, the Policy insures a property in Georgia, and the Policy was delivered to Ms. Gomez in Georgia. As such the Policy was made in Georgia. Therefore, in accordance with the rule of *lex loci contractus*, the laws of Georgia are to be used to interpret the Policy.

ii. As the Structure is used in connection with living at 3743 Miller Dr. NE, Dalton, GA 30721, the Structure is part of the dwelling.

Since Georgia law the Structure is used in connection with the primary structure and is located adject to it, the Structure is part of the dwelling as defined by Georgia law.

First and foremost, insurance policies in Georgia are to be "narrowly and strictly construed against the insurer and [forgivingly] construed in favor of the insured to afford coverage." Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 779 S.E.2d 55 (2015) (citing Georgia Farm Bureau Mut. Ins. Co. v. Meyers, 249 Ga. App. 322, 548 S.E.2d 67 (2001). And when "an exclusion sought to be invoked by the insurer [it] will be liberally construed in favor of the insured and strictly construed against the insurer." W. Pac. Mut. Ins. Co. v. Davies, 267 Ga. App. 675, 680-681, 601 S.E.2d 363 (2004). It is only when the policy is so clear and unequivocal that it is only open to a single interpretation, should the policy not be construed against the insurer. Id.

With the foregoing in mind, the next step is to determine if the Structure is with the meaning of "dwelling" so as to afford coverage for Ms. Gomez's loss. Under Georgia's law of contract interpretation, the court is to first look at how the contract defines the specific term, and if it is undefined, the court is to apply term's ordinary meaning. Archer Western Contractors, Ltd. v. Estate of Mack Pitts, 292 Ga. 219, 224, 735 S.E.2d 772 (2012) (citing OCGA § 13–2–2(2) ("we generally accept that contractual terms carry their ordinary meanings"). Georgia Courts have determined the common meaning of a "dwelling" to mean "'in law the entire congregation of buildings, main and auxiliary, used for abode.' It includes everything pertinent and accessory to the main building and may consist of a

cluster of buildings." Tudor v. Am. Emp. Ins. Co., 121 Ga. App. 240, 243, 173 S.E.2d 403 (1970) (quoting N. British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 383, 58 S.E. 110 (1907)). This specifically "includes everything pertinent and accessory to the main building and may consist of a cluster of buildings." Tudor v. Am. Emp. Ins. Co., 121 Ga. App. 240, 243, 173 S.E.2d 403 (1970) (citing 28 C.J.S. 599, 602, 603, Dwelling). As such, the term "dwelling" clearly includes multiple structures. This is also reflected in the online dictionary cited by Defendant that notes "most courts agree that a dwelling includes its curtilage." https://www.merriam-webster.com/dictionary/dwelling. (the curtilage being the grounds and structures surrounding the main living building).[1]

Based on the foregoing, it is evident that the common meaning of "dwelling" embraces multiple structures that are used for abode. In this case, Defendant failed to review Georgia law to determine the common meaning of "dwelling" and as such incorrectly concluded that a "dwelling" is limited to a single structure. The structure lost in this matter is a garage located immediately next to the main structure and used intimately therewith as part of the abode. The pictures cited by Defendant show that the Structure is used in connection with the main structure. Even if it is a "shed" as claimed by Defendant [Doc. 12, p. 3], it is immediately

[1] "The Supreme Court of Georgia has defined curtilage as 'the yards and grounds of a particular address, its gardens, barns, and buildings.'" Corey v. State, 320 Ga. App. 350, 739 S.E.2d 790 (2013) (quoting Landers v. State, 250 Ga. 808, 809, 301 S.E.2d 633 (1983)).

adjacent to and used in connection with the main structure as part of the abode. It is therefore part of the dwelling. Nothing in the Policy limits coverage to a single structure. Nothing in the Policy provides that the structures have to be expensive, new, or of top quality. [Doc. 7-1]. The Policy expressly provides coverage for "Your dwelling shown on the Declarations Page." And the declarations page lists the address of the main structure and the garage.

LOCATION # 1

IMPORTANT RATING INFORMATION					
PREMISES DESCRIPTION:	3743 MILLER DR NE DALTON GA 30721-6956				
CONSTRUCTION:	FRAME	TERRITORY:	B	YR. BUILT:	1945
FAMILIES:	1	PROT. CLASS:	3	FORM:	DF3
OCCUPANCY:	PRIMARY	RESP. FIRE DEPT.:	WHITFIELD CO FS 3		
HYDRANT:	WITHIN 1,000 FEET	COUNTY:	WHITFIELD		
FIRE DEPT.:	WITHIN 5 MILES				

[Doc. 7-1and Doc. 7-2]. In fact, Defendant has previously claimed that only the separate structures listed in an Exclusion of Coverage for a Specific Structure are excluded from coverage. [Doc. 7, ¶¶ 19-21 and Doc. 7-8]. It is also important to note that the Exclusion of Coverage for a Specific Structure does not list a single structure to be excluded from coverage. Id.

Important Notice
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Your insurance policy **EXCLUDES** coverage for a specific structure.

SPECIFIC STRUCTURE EXCLUSION

The structures described on this endorsement are excluded from all coverages provided in Section I Coverage B - Other Structures, and SECTION I Additional Coverages.

All other provisions of your policy apply.

Please read your policy for details.

If you have any questions about your policy, please contact your Foremost representative. Your representative will be happy to review your policy with you. You'll find your representative's name and address listed on the Declarations Page of your policy.

Thank you for choosing a Foremost policy. We appreciate your trust and confidence.

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Id. As such, when this Court views Plaintiff's Complaint in the light most favorable to her and accepts all facts therein as true, it is evident that Defendant's Motion [Doc. 12] must be denied.

Additionally, a careful reading of the policy exclusion, picture infra, relied on by Defendant shows that the Policy actually includes structures attached to the dwelling unless they are attached by a fence, utility line, or similar connection.

We insure:

1. Your dwelling shown on the Declarations Page;
2. Materials and supplies on your **premises** for use in the construction, alteration, or repair of your dwelling shown on the Declarations Page;
3. Any structure you own on your **premises** that is attached to your dwelling, other than an other structure attached by a fence, utility line, or similar connection; and
4. Your fixtures and appliances that are built in or permanently affixed to your dwelling.

[Doc. 7-1, p. 10]. This Policy provision is specifically discussing structures "**attached** to your dwelling, other than another structure attached by a fence, utility line, or similar connection." (emphasis added) [Doc. 12, p. 3 (quoting [Doc.7-1, p. 10]). The structure at issue is not physically attached to the main structure by a fence, utility line, or similar connection and as such this policy provision, even if interpreted as Defendant suggests, does not apply. Based on the foregoing, Defedant's Motion [Doc. 12] must be denied.

c. As the determination of bad faith is a jury question, Defendant's Motion [Doc. 12] must be denied.

In Defendant's Motion [Doc. 12] it asserts that Plaintiff is not entitled to recover bad faith damages as Plaintiff, allegedly, as Plaintiff's claim was not covered by the policy and as Defendant's denial was not frivolous and unfounded. [Doc. 12, pp. 8-9]. However, Defendant is again asking this Court to make the determination of a jury question.

Georgia law provides that "[t]he question of bad faith is generally for the jury." Henderson v. Georgia Farm Bureau Mut. Ins. Co., 328 Ga. App. 396, 762 S.E.2d 106 (2014); see also Jimenez v. Chicago Title Ins. Co., 310 Ga. App. 9, 12, 712 S.E.2d 531 (2011); Certain Underwriters etc. v. Rucker Constr., Inc., 285 Ga. App. 844, 850, 648 S.E.2d 170 (2007); First Financial Ins. Co. v. American Sandblasting Co., 223 Ga. App. 232, 233, 477 S.E.2d 390 (1996); St. Paul Fire & Marine Ins. Co. v. Snitzer, 183 Ga. App. 395, 397, 358 S.E.2d 925 (1987).

In this case, like all other insurance bad faith cases, the question of "did the insurer act in bad faith" is to be answered by a jury. And in this case, as a jury has been properly demanded, the question of Defendant's bad faith should be left to the jury. [Doc. 7]. Therefore, Defendant's Motion [Doc. 12] must be denied accordingly.

Additionally, there are plenty of actions by Defendant that a jury could use to find bad faith. First, Defendant refused to adjust the claim within 60 days. [Doc. 7, ¶¶ 14-24]. Defendant further refused to pay the claim with 60 days. Id. Defendant even refused to send Plaintiff a complete certified copy of the Policy. Id. Any one of these actions is enough for a reasonable juror to conclude that Defendant acted in bad faith. Further, through discovery, Ms. Gomes may learn of other actions by Defendant that constitute bad faith. Therefore, as there are multiple actions of Defendant that may constitute bad faith, and as more acts of bad faith may be learned of through discovery, Defendant's Motion [Doc. 12] must be denied.

d. As the Fed. R. Civ. Pro. specifically permits contrary claims to be pled in the alternative, Plaintiff may assert alternative theories of recovery.

In Defendant's Motion [Doc. 12], it claims that Plaintiff cannot plead in the alternative claims for promissory estoppel, unjust enrichment, and alternate theories of recovery of attorney's fees. However, this practice is specifically

allowed by Fed. R. Civ. Pro. 8(d). As such, Defendant's Motion [Doc. 12] must be denied.

Fed. R. Civ. Pro. 8(d) states that "A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." This specifically includes the pleading of claims that are contrary to each other. For instance, in Clark v. Aaron's, Inc., the court found that the plaintiff was allowed to plead unjust enrichment in the alternative to its claim for breach of contract claim even though there was an express contract; the plaintiff just could not recover on both claims. Clark v. Aaron's, Inc., 914 F. Supp. 2d 1301 (N.D. Ga. 2012). The court specifically stated that on a motion to dismiss "it would be premature to dismiss the unjust enrichment count simply because an express contract exists."

Additionally, if a single claim in the complaint asserts a feasible theory of recovery, it is improper to dismiss a complaint or strike the alternative claims. Bank of California, N.A. v. Am. Fruit Growers, 37 F. Supp. 1017 (E.D. Wash. 1941) (citing Fed. R. Civ. Pro. 8 and Keiser v. Walsh, 118 F.2d 13 (D.C. Cir. 1941) (Where amended complaint pled four alternatives, a motion to strike portions of the amended complaint was denied under the Federal Rules which permit pleading of alternatives). This remains true, even if the alternative claims

are inconsistent with other claims asserted. Stockton E. Water Dist. v. United States, 583 F.3d 1344 (Fed. Cir. 2009), on reh'g in part, 638 F.3d 781 (Fed. Cir. 2011) (Ruling that state water districts' assertion of claim against United States for breach of contracts to provide districts with specified quantities of water did not preclude districts from alleging in the same complaint takings claim as an alternate theory of recovery, even if the theories were inconsistent.)

In the case at bar, Plaintiff has asserted a several alternative theories of recovery. In the alternative of a valid contract, Plaintiff has asserted claims for promissory estoppel and unjust enrichment. There has been no determination that the Policy is a binding contract and discovery must be conducted to determine the same. This is exactly like Clark v. Aaron's, Inc., because like in it, discovery is needed in this case to determine which counts are feasible. 914 F. Supp. 2d 1301 (N.D. Ga. 2012).

Additionally, Plaintiff has asserted alternate theories of recovery for attorney's fees. Plaintiff has primarily asserted a claim for attorney's fees pursuant to O.C.G.A. § 33-4-6. [Doc. 7, p. 13]. And she has also asserted alterative claims for attorney's fees pursuant to O.C.G.A. §§ 13-6-11 and 9-15-14.[2] [Doc. 7, p. 13]. This is because, even if Defendant's conduct does not rise to the level of insurance bad

[2] "Ms. Gomez prays for the following relief" … "Plaintiff be awarded attorney's fees and costs of litigation pursuant to O.C.G.A. § 33-4-6, or in the alternative, pursuant to O.C.G.A. §§ 13-6-11 and 9-15-14." [Doc. 7, p. 13]

faith, Plaintiff can still win this case and recover attorney's fees. There is no law that states an insured can only recover attorney's if the insurer acted in bad faith. Rather, the law, as cited by Defendant, states that if an insured recovers attorney's fees pursuant to the bad faith statute, the insured cannot again recover attorney's fees pursuant to another statute. This is completely logical as it prevents a double recovery. And Plaintiff is in no way asserting that she should be entitled to a double recovery of attorney's fees. Rather, Ms. Gomez is asserting that she is entitled to attorney's fees pursuant to O.C.G.A. § 33-4-6 because Defendant acted in bad faith. And if Defendant did not act in bad faith, she is still entitled to attorney's fees pursuant to O.C.G.A. §§ 13-6-11 and 9-15-14. Therefore, as Fed. R. Civ. Pro. 8(d) specifically permits the pleading of contrary claims in the alternative, Defendant's Motion [Doc. 13] must be denied.

IV. CONCLUSION

For the foregoing reasons, Foremost Insurance's Motion [Doc. 12] must be denied.

[signature on following page]

Respectfully submitted this 14th day of June, 2024.

MCCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP

By: ***/s/ Noah T. Bledsoe*****_______________**

NOAH T. BLEDSOE
GA BAR NO.: 877958
nbledsoe@mccamylaw.com
ATTORNEY FOR PLAINTIFF

The Keith Building
101 N. 4th Ave.
Chatsworth, GA 30705

CERTIFICATE OF SERVICE AND TYPE SIZE COMPLIANCE

Pursuant to Local Rule 5.1C, ND Ga. and Standing Order No. 16-01, the foregoing pleading is prepared in Times New Roman, 14 point, and was filed using the CM/ECF system, which will automatically provide notice to the following attorney of record by electronic means:

Philip W. Savrin, Esq.

Meredith M. Friedheim, Esq.

This 14th day of June, 2024.

MCCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP

By: ***/s/ Noah T. Bledsoe*_______________**
NOAH T. BLEDSOE
GA BAR NO.: 877958
nbledsoe@mccamylaw.com
ATTORNEY FOR PLAINTIFF

The Keith Building
101 N. 4th Ave.
Chatsworth, GA 30705