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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2009-CP-10-3608

Elizabeth Livingston,

Respondent,

v.

Danube Valley Exports, LLC,
Vicki W. Smith, and William
Smith

Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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Other Counsel of Record:
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1. BECAUSE SC CODE § 27-37-155 ONLY APPLIES WHEN POSSESSION IS AT
ISSUE, THE TRIAL COURT ERRED WHEN IT ORDERED BOTH VACATION OF
THE PREMISES AND UNCONDITIONAL PAYMENT OF RENT, *PENDENTE LITE*.3

2. BECAUSE THE ORDER FILED SEPTEMBER 18, 2009 DETERMINING THE
AMOUNT DUE AND VACATION OF THE PREMISES WAS INTERLOCUTORY,
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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 2, 2012.

QUESTION PRESENTED

1. Did the trial court err in entering an order on amount of rent due, *pendente lite*, when vacation of the premises was not at issue?
2. Did the Court of Appeals err in dismissing Danube's appeal as "conceded to be" interlocutory?

STATEMENT OF THE CASE

On May 16, 2009, Elizabeth Livingston brought this Action for Ejectment meant against Danube Valley Exports in the Magistrate's Court. Danube Valley Exports filed an Affidavit, Answer and Counterclaim. On June 1, 2009 the Magistrate entered an order transferring the action to the Circuit Court.¹ On June 25, 2009, Elizabeth Livingston, in the form of an Amended Complaint from Magistrate's Court, brought this action against Danube Valley Exports, LLC, Vicki W. Smith, and William Smith in the Court of Common Pleas, Charleston County, South Carolina. (Appendix p. 66). The allegations set forth in this Amended Complaint state that Defendant breached a lease contract for rental space and therefore also complained for ejectment. (Appendix p. 70). Parties prior to that time entered into an agreement whereby the Defendants leased commercial property from Plaintiff. (Appendix p. 72).

Defendants' Counter-Claim, filed on July 21, 2009, alleged that Plaintiff failed *inter alia* to

¹ Record at this page is titled "order dated September 14, 2010 filed September 18, 2010 but it should be titled order dated September 14, 2009 filed September 18, 2009.

provide reasonable commercial access to the property. (Appendix p. 84).

The Court considered the Parties' positions on the matter, and on September 18, 2009, the Court issued a Rule to Vacate the leased premises and pay to the Court *pendente lite*, the amount of \$17,852.75 for rent within forty (40) days of the issuance of the Rule to Vacate. The Court also scheduled a hearing in the matter for later than 120 days from the filing of the Rule to Vacate. (Appendix p. 47). The Court applied South Carolina Code § 27-37-155 in this matter, finding for both ejectment and the payment of rents, *pendente lite*.

On October 12, 2009, Plaintiff filed a Motion for Summary Judgment, based upon South Carolina Rule of Civil Procedure ("SCRPC") Rule 56, with a Rule to Show Cause for Contempt for failure to pay \$17,852.75 which was granted November 10, 2009 and filed November 12, 2009. (Appendix p. 19).

The matter came before the Court on January 26, 2010. A Ruling and Order was issued by the Court on February 2, 2010. In that Order, the Court granted summary judgment for the Plaintiff on all grounds. (Appendix p. 5) Danube filed a Motion for Reconsideration. The trial court denied the Motion for Reconsideration by Order dated April 7 and filed April 9, 2010. (Appendix p. 5).

On January 25, 2012, the Court of Appeals dismissed Appellant Danube's claim stating that Danube, during oral arguments conceded that the Charleston County Order of Court on September 18, 2009 was interlocutory in nature and not affecting a substantial right or upon the merits of the case. (Appendix p. 211).

Defendant Danube then filed a Petition for Rehearing on February 9, 2012. (Appendix p. 213). An Order Denying Petition for Rehearing was filed by the Court of Appeals on March 2, 2012. (Appendix p. 215).

Petitioner seeks a writ of certiorari to review the decisions.

ARGUMENT

- 1. BECAUSE SC CODE § 27-37-155 ONLY APPLIES WHEN POSSESSION IS AT ISSUE, THE TRIAL COURT ERRED WHEN IT ORDERED BOTH VACATION OF THE PREMISES AND UNCONDITIONAL PAYMENT OF RENT *PENDENTE LITE*.**

This Petition for Writ of Certiorari involves considerations identified in SCACR 242(b). This issue involves a substantial Constitutional question of first impression on this Code Section. Essentially, the Trial Court misapplied SC Code § 27-37-155. SC Code § 27-37-155 Constitutionally allows a summary determination of rent due to tenants in possessory actions. See *e.g. Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). By contrast the Trial Court may not summarily order payment of rents *pendente lite* when possession, as in the instant case (Appendix p. 47), is not at issue. The Trial Court's Order is in error with regard to the Statute and is a violation of the Due Process Clause. *See e.g. Id.* 76. The Court of Appeals failed to address this Constitutional and Statutory violation of the Trial Court.

The Constitutional protections of the Bill of Rights, at the Federal level have been overridden of late by all three branches of the Federal Government on account of concerns of "National Security". Petitioners pray that this Court will grant this petition of Writ of Certiorari and uphold the Constitutional Due Process protection of access and fair hearing here where there is no National Security issue involved.

2. **BECAUSE THE ORDER FILED SEPTEMBER 18, 2009 DETERMINING THE AMOUNT DUE AND VACATION OF THE PREMISES WAS INTERLOCUTORY, AS AN INTERMEDIATE ORDER OR DECREE, THE APPEAL SHOULD NOT HAVE BEEN DISMISSED AS IT WAS TIMELY FILED AFTER FINAL JUDGMENT.**

This Petition for Writ of Certiorari involves considerations identified in SCACR 242(b). This dismissal conflicts with the prior Supreme Court's decision in Cappell v. Moses, 36 S.C. 559, 15 S.E. 711 (1892).

Petitioners argue that there was no "concession" by any Petitioner that the appeal was "interlocutory." Petitioners assert the order of the Honorable Kristi Lea Harrington dated September 14, 2009 filed September 18, 2009 (Appendix p. 47)² was interlocutory as "an intermediate order or decree necessarily affecting the judgment not before appealed from" within the meaning of SC Code § 14-3-330(1) until the order of the Honorable Kristi Lea Harrington dated April 7, filed April 9, 2010. (Appendix p. 5).

§ 14-3-330. Appellate jurisdiction in law cases

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

Petitioners argue that they have followed, with respect to the interlocutory intermediate order

² The description typed on the top of page 44 of the record incorrectly reflects 2010 instead of 2009 as
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of the Honorable Kristi Lea Harrington dated September 14, 2009 filed September 18, 2009 (Appendix p. 47). the course, namely to wait until the final judgment to appeal, as recommended by the Supreme Court in Capell v. Moses, 36 S.C. 559, 15 S.E. 711 (1892)

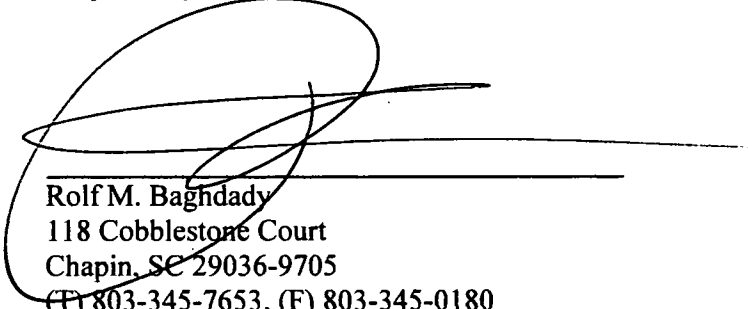
As we before remarked, it is only in exceptional cases that this court views with approval an appeal from an interlocutory order; for it is usually far better to await the coming here upon an appeal from a final decree or judgment, at which time it is competent for this court to review alleged defects or errors, not only in the final decree or judgment, but also at the same time to consider alleged errors in intermediate or interlocutory orders. McCrary v. Jones, 15 S.E. 430 (S. C. 1892) and cases there cited.

Petitioners, pray the Supreme Court will grant this Writ of Certiorari to consider the Court of Appeals decision which conflicts with a prior Supreme Court decision.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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Attorney for Petitioner

Dated: April 2, 2012

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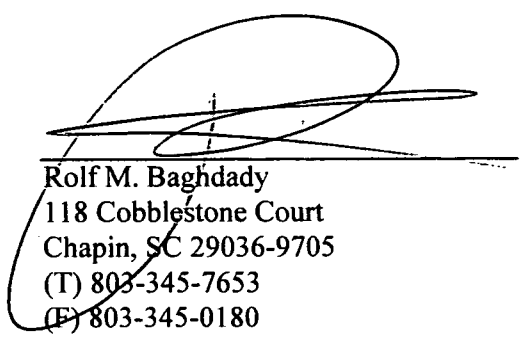
Danube Valley Exports, LLC,
Vicki W. Smith, and William
Smith

Petitioners.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix on Elizabeth Livingston by depositing a copy of it in the United States Mail, postage prepaid, on April 2, 2012 addressed to her attorney of record, Timothy J. W. Muller, Esquire, Rosen, Rosen & Hagood, LLC, Post Office Box 893, Charleston, South Carolina 29402 and via hand delivery to the Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, Calhoun Building, 1015 Sumter Street, Columbia, South Carolina 29201.

April 2, 2012



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April 2, 2012

VIA HAND DELIVERY

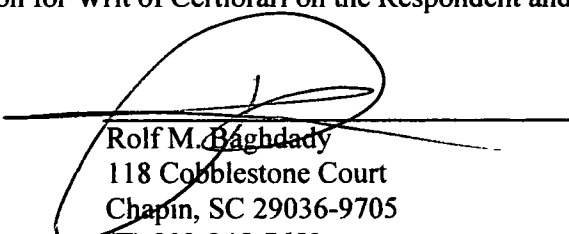
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Elizabeth Livingston, Respondent, v. Danube Valley Exports, LLC, Vicki W. Smith and William Smith, Appellants, Case No. 2009-CP-10-3608

Dear Mr. Shearouse:

Enclosed for filing is a Petition for Writ of Certiorari in the above case, with the following:

- (1) The Original Petition for Writ of Certiorari and six (6) copies, one (1) copy which is unbound;
- (2) Two (2) copies of the Appendix one (1) of which is unbound;
- (3) A filing fee of \$100; and
- (4) Proof of service of the Petition for Writ of Certiorari on the Respondent and the Clerk of the Court of Appeals.


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