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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Case No.: 2009-CP-10-3608

Elizabeth Livingston
Plaintiff

versus

Danube Valley Exports, LLC ETAL
Defendant

FILED
2010 APR -9 AM 10:19
JULIE J. ARISTARACH
CLERK OF COURT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. nonsuit)
☐ Rule 43(k), SCRPC (Settled);
☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☐ Statement of Judgment by Court
Defendant's motions for reconsideration of the Judgment dated January 28, 2010 was heard and respectfully denied.

Dated at Charleston, South Carolina,

April 7, 2010
Date

Judge

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____ Day of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

SCRP Form 4 (Rev. 2/96)

Clerk of Court

FILED

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
Checked in

This matter came before the Court on January 26, 2010, on Plaintiff Elizabeth Livingston's Motion for Summary Judgment and Rule to Show Cause. After reviewing the motion and supporting materials, I have determined that there is no issue of material fact and that Plaintiff Elizabeth Livingston is entitled to judgment as a matter of law.

FACTS

Plaintiff Elizabeth Livingston ("Livingston" or "Plaintiff") is the owner of a small historic building located at 163 King St. Charleston, South Carolina. Livingston and Defendant Danube Valley Exports, LLC ("Danube") entered into a lease agreement for the building (the "premises") on September 17, 2008, whereby Danube would occupy the space as tenant. Defendants Vicki W. Smith and William Smith signed personal guaranties to the lease agreement in the event Livingston could not recover rent or damages from Danube. Danube agreed to lease the premises for a period of five (5) years commencing on October 1, 2008. The expiration of the lease term is September 30, 2013.

In the lease agreement, the parties agreed that Danube would pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each



year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. The lease agreement further provides that Danube will incur a 15% late fee per month for any rent not received by the fifth (5th) day of each month. In the event of default by Danube, the lease agreement provides that Danube is responsible for all costs incurred by Livingston in bringing legal proceedings to enforce Danube's obligations, including reasonable attorney's fees. Danube was given the first two months free rent in lieu of any tenant up fit by Livingston, with Danube's first rent being due on December 1, 2008.

Danube paid rent for December 2008, January 2009, and February 2009. On February 27, 2009, after Defendants communicated concerns to Livingston about the poor state of their retail business, Livingston and Danube signed an addendum agreeing that Danube would pay one-half of its normal rent, in the amount of \$1,898.95, for the months of March, April, and May, 2009 only. Danube paid the one-half rent for March and failed to pay rent due for April. On or about April 22, 2009, after repeated attempts by Livingston to reach Defendants regarding past due rent, Defendant Vicki W. Smith contacted Livingston to inform her they would be unable to pay rent for April. On May 1, 2009, Livingston sent Defendants a certified letter requesting rent payment for April and May and the late fee pursuant to the lease agreement, in the amount of \$4,082.74. Danube submitted a check for \$1,000 to Livingston on May 4, 2009, and has since refused to make further payment.

On May 15, 2009, Livingston applied to eject Danube and for a rule to vacate or show cause in Charleston County Magistrate's Court for its breach of the lease agreement. On May 29, 2009, Danube submitted an answer and counterclaim to Livingston's eviction application, alleging it had damages in excess of \$7,500 and that this court had jurisdiction over the matter.

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In support of its damage allegation, Danube argued that the City of Charleston's street beautification project of lower King Street (hereinafter "streetscape project") and the poor economy had caused their business economic harm. This streetscape project is believed to have been wholly operated by the City of Charleston and its employees or contractors, and Livingston has no control or influence over this project. Furthermore, the streetscape project had commenced prior to the parties entering into the lease agreement and was thereby a foreseeable event to both parties.

On June 25, 2009, Livingston submitted an amended summons and complaint, asserting causes of action for breach of contract and ejectment of tenants. On July 21, 2009, Defendants submitted another answer and counterclaim, making nearly identical allegations as their earlier answer, but further demanding a jury trial. Defendants again argued that they were entitled to a reduction in rent or should not have to pay rent at all because of their low retail profitability and the City of Charleston's streetscape project. Ironically, Danube failed to pay rent for two of the three months that rent was reduced, as reflected in the lease agreement addendum.

On July 15, 2009, Livingston filed a motion to vacate or show cause and writ of ejectment and supporting memorandum of law against Danube in order to evict Danube for its refusal to pay rent and to recover mounting past due and accruing rent. After hearing oral arguments, Judge Harrington issued an order on September 14, 2009. This order required Danube to vacate the leased premises within ten (10) days from the issuance of the order and required Danube to pay to this Court \$17,852.75 in unpaid rent within forty (40) days, pursuant to S.C. Code Ann. § 27-37-155, during the pendency of the action.

At the expiration of forty days, Defendants had vacated the premises but failed or refused to pay the unpaid rent to this Court, as required by Judge Harrington's order. In response,

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Livingston filed a rule to show cause and verified petition asking this Court to hold Defendants in contempt of this Court's previous order, striking Defendants' answer and counterclaim, requiring Defendants to comply to this Court's previous order, and requiring Defendants to pay costs and attorney fees, pursuant to their lease agreement, for the costs associated with filing the rule to cause and petition because of Defendants' failure or refusal to comply with this Court's order. This rule to show cause is being addressed concurrently with Plaintiff's motion for summary judgment.

On October 12, 2009, Livingston filed this motion for summary judgment against all Defendants in this matter. In support of her motion, Livingston submitted affidavits of Kit Regnery, Livingston's real estate leasing agent, and Timothy J.W. Muller, Esq., one of her attorneys in this matter.

CONCLUSIONS OF LAW

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

In particular, the trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Baughman v. AT&T Co., 306 S.C. 101, 410 S.E.2d 537 (1991). The plain language of Rule 56(c) mandates the entry of summary judgment,



after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. Celotex, 477 U.S. at 317. In such a situation, there can be "no genuine issue as to any material fact" since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Id. at 322-23.

The party seeking summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Where there is conflicting evidence, of course, the Court must take the evidence in a light most favorable to the non-moving party. Kun v. Berkeley County Government, 214 F. Supp. 2d 559 (D.S.C. 2001). However, a non-moving party may not simply identify the existence of a question of fact; she must come forward with competing evidence and show that there is a legitimate question regarding its resolution. See Benton v. Ozmint, 2004 WL 3249249 (D.S.C. Oct. 27, 2004). Likewise, when a motion for summary judgment is made and supported, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRPC (2009).

A. Breach of Contract

Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by a consideration of the plain and



unambiguous language of the contract, the question as one of law may be resolved by the court. Lyles v. BML, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987); citing First-Citizens Bank & Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984). By failing to pay rent when due, Defendant Danube breached its lease agreement with Livingston. The language of the lease agreement is unambiguous and incapable of more than one construction: Danube was contractually obligated, for a period of five (5) years, to pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. In addition, "[a]ll rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance; occurring from the first day of every month for which rental is due but unpaid." Paragraph 4, Lease Agreement (Sept. 17, 2008) (attached as Exhibit A to Plaintiff's Motion for Summary Judgment). While this rent amount was reduced in half, by addendum, for the months of March, April, and May of 2009 only, Danube stopped paying rent in April and elected to remain in the premises without paying rent. Danube's failure to pay rent when due, failure to cure its default, and subsequent refusal to vacate the premises after it ceased paying rent undoubtedly amount to a breach of the lease agreement.

Upon Danube's failure to pay rent when due and failure to cure such default of the lease agreement, paragraph 19 addresses "Default and Remedies." According to paragraph 19 of the lease agreement,

If Landlord should elect to reenter as herein provided, or should it take possession pursuant to legal proceedings, it may either terminate this Lease or it may from time to time without terminating this Lease, relet the Premises for such term and at such rentals and upon such other terms and



conditions as the Landlord may deem advisable. If such reletting shall yield rentals insufficient for any month to pay the rental due by Tenant hereunder for that month, Tenant shall be liable to Landlord for the deficiency and same shall be paid monthly. No such reentry or taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease unless written notice of such intention given by the Landlord to the Tenant at the time of such reentry; but, notwithstanding any such reentry and reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. If as a result of Tenant's default hereunder, Landlord shall institute legal proceedings for the enforcement of Tenant's obligations, Tenant shall pay all costs incurred by Landlord, including reasonable attorney's fees.

Paragraph 19, Lease Agreement (Sept. 17, 2008) (attached as Exhibit A to Plaintiff's Motion for Summary Judgment). As provided in this paragraph, Livingston was forced to institute legal proceedings to reenter the premises when Danube refused to pay rent and vacate. Livingston has not, nor is she obligated to, terminate this lease agreement. According to the clear language of paragraph 19, Danube shall be liable to Livingston for any deficiency Livingston may incur in her attempt to now relet the premises for the remainder of the lease period, which expires on September 30, 2013. In addition, Danube is obligated to pay all costs incurred by Livingston in having to bring these legal proceedings, including reasonable attorney's fees. The damages recoverable to Livingston here are in accordance with South Carolina law. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996) (purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if contract had been performed).

Moreover, the obligations of Danube are binding upon Defendants Vicki W. Smith and William Smith in accordance with their signed personal guaranties to the lease agreement. As stated in the lease agreement guaranty page, Livingston permitted Danube to be named as tenant on the lease only upon the signing of personal guarantees by Defendants Vicki W. Smith and William Smith. Upon Danube's failure to pay rent, the personal guaranties binds Defendants

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personally thereafter for "all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance. . ." Accordingly, all Defendants are liable for Danube's breach of the lease agreement.

The plain language of the lease agreement and personal guaranties are unambiguous and their interpretation is one of law which should be resolved by this court. Defendants have breached the lease agreement and are liable for unpaid rent, late fees, the costs incurred in bringing these legal proceedings, including reasonable attorney's fees, along with any deficiency Livingston may incur in her attempt to relet the premises during the lease period which expires on September 30, 2013. Because there are no genuine issues of material fact, Livingston's motion for summary judgment is hereby granted.

B. Defendants' Answer and Counterclaim

Defendants' answer and counterclaim likewise contain no genuine issue of material fact and Livingston's motion for summary judgment is similarly granted as to Defendants' counterclaim. Defendants' counterclaim alleges that the terms of their lease agreement require Plaintiff "to deliver peaceful occupation" and "to provide reasonable commercial access to the property for the Defendant and her customers." *Defendants' allegation is false – there are no such terms contained in the lease agreement.* To the contrary, paragraph nine (9) of the lease agreement states:

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises, or the uses to which the leased property may be put. *The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personality, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring thereto, or the existence with respect*



thereto of any violations of the laws or regulations of any governmental authority.

Paragraph 9, section c, Lease Agreement (Sept. 17, 2008) (emphasis added) (attached as Exhibit A to Plaintiff's Motion for Summary Judgment). Moreover, paragraph twenty-one (21) of the lease agreement, which pertains to "quiet enjoyment," merely states that Danube shall receive no interference from Livingston or anyone claiming a right of title to the property during the lease period. Livingston had no control over the City of Charleston's streetscape project and its completion or Danube's poor retail profitability. Accordingly, Defendants' allegations that Livingston broke these terms -- not contained within the lease agreement -- are completely without merit.

Defendants also allege that the City of Charleston's streetscape project, already in progress at the signing of the lease, and their understanding of its completion date, caused Defendants economic harm and should thereby preclude the enforcement of the lease agreement. Nowhere in Danube's lease agreement is there language pertaining to the streetscape project identified in their counterclaim. If this project was a condition of the lease in anyway, such a term or condition would have been contained therein. Defendants' vague suggestion that an oral representation as to the completion date of the City-controlled project should be considered in resolving their breach of the lease agreement is simply barred by the parol evidence rule.

"It is well established in South Carolina that parole evidence is inadmissible to vary or contradict the terms of an agreement reduced to writing." Young v. McKelvey, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985). "[A] written agreement between two persons merges all prior talk and negotiations about the subject of the agreement. Words cannot be read into a contract which import intent wholly unexpressed when the contract was executed." Parker v. Byrd, 309 S.C. 189, 192, 420 S.E.2d 850, 852 (1992). Moreover, "it is not proper to receive testimony to

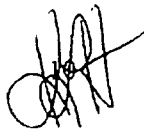


vary or contradict the terms of such agreement.” Gantt v. Van der Hoek, 251 S.C. 307, 317, 162 S.E.2d 267, 272 (1968). Because this City of Charleston streetscape project was not a term of the lease agreement, Defendants’ allegation and any proposed testimony on this issue is barred by the parol evidence rule.

Even if the parol evidence rule was not deemed to bar testimony on this issue, no claim lies for any alleged harm based on Defendants’ understanding of the streetscape project’s completion date. While Defendants failed to identify any particular cause of action in their counterclaim, no possible claim could exist under these circumstances. Paragraph eight of Defendants’ answer and counterclaim states that “[u]nknown to the Defendant, but known to the Plaintiff and/or her agents, the city’s construction project would, for an unreasonably long period of time, preclude the Defendant’s reasonable commercial use of the property, and is so precluding such use.”¹ However, in paragraph six, Defendants correctly state that at the time the parties entered into the lease “[c]onstruction on King Street improvements and renovations by the City of Charleston was then in progress.” The fact that this project was in progress at the time of the signing of the lease makes the streetscape project clearly foreseeable at the time the lease was signed and any understanding as to the completion of the City-controlled project was thus a future event.

Although not alleged by Defendants, no action lies here for frustration of purpose or negligent misrepresentation. The doctrine of frustration is only available where a supervening event is unforeseeable. Sanchez v. Tilley, 285 S.C. 449, 451, 330 S.E.2d 319, 320 (Ct. App. 1985). Regarding negligent misrepresentation, the rule under South Carolina law is that for a false representation to be actionable, it must relate to a present or preexisting fact that is false

¹ As stated, the lease agreement does not contain any terms obligating Livingston to provide Danube “commercial use” or “access” to the premises.



when made and cannot ordinarily be based on unfulfilled promises or *statements as to future events*. Private Mortg. Inv. Svcs., Inc. v. Hotel & Club Assocs, 296 F.3d 308 (4th Cir. 2002) (emphasis added); see also Sauner v. Pub. Svc. Auth. of S.C., 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003) ("Representations based on statements as to future events or unfulfilled promises are not usually actionable.") Moreover, the negligent misrepresentation element of justified reliance only exists where the relationship of the parties is such that one party occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement. Gruber v. Santee Frozen Foods, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992).

While not identified as a cause of action, Defendants claim that Livingston or her agent knew that the City's streetscape project would take longer than Defendants understood. The completion date of the then existing streetscape project or any understanding thereof would have been a future event at the time of the lease agreement's signing. Furthermore, neither Livingston nor her leasing agent had a superior position of knowledge regarding the completion of the City of Charleston's streetscape project. Defendants and their agent were just as capable of contacting the City regarding an estimated completion date. As indicated in the Affidavit of Kit Regnery, the project was subsequently delayed, in part, at the request of the retailers themselves to take advantage of the long holiday shopping season. Because the completion date of the City's streetscape project was merely speculative, under the control of the City of Charleston, and was a future event, no action could possibly exist for negligent misrepresentation under these circumstances. As mentioned, if the streetscape project was truly an issue at the time of the signing of the lease, such a term should have been included and bargained for in the lease agreement prior to its execution.



C. Rule to Show Cause

Livingston's rule to show cause and verified petition is being addressed concurrently with Livingston's motion for summary judgment. This rule to show cause was filed for Defendants' failure to deposit unpaid rent to this Court, as required by Judge Harrington's previous order dated September 14, 2009. Because Defendants have failed or refused to comply with this Court's order, Livingston asks this Court to hold Defendants in contempt of this Court's previous order, striking Defendants' answer and counterclaim, requiring Defendants to comply to this Court's previous order, and requiring Defendants to pay costs and attorney fees, pursuant to their lease agreement, for the costs associated with filing the rule to cause and petition. The granting of Livingston's motion for summary judgment in full renders this rule moot. However, pursuant to the lease agreement, Defendants shall pay the costs associated with bringing this motion, including reasonable attorney's fees.

RULING

Based upon the above Findings of Fact and Conclusions of Law, the Court rules as follows:

1. Plaintiff's Motion for Summary Judgment as to her breach of contract action against Defendants Danube Valley Exports, LLC, Vicki W. Smith, and William Smith is granted;
2. Plaintiff's Motion for Summary Judgment is hereby granted against the counterclaim filed by Defendants Danube Valley Exports, LLC, Vicki W. Smith, and William Smith;



3. Pursuant to the lease agreement at issue, Plaintiff is entitled to a current judgment against Defendants Danube Valley Exports, LLC, Vicki W. Smith, and William Smith, in the amount of \$32,682.91 for past due rent and late fees.

4. Pursuant to the lease agreement at issue, Plaintiff is entitled to a total amount of \$16,678.98 for the costs of bringing these legal proceedings, which include reasonable attorney's fees.

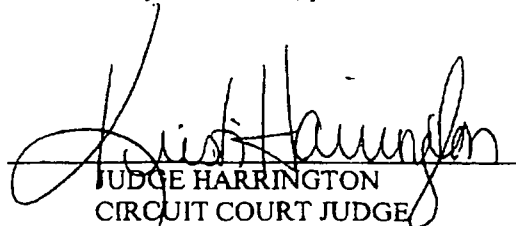
5. Plaintiff is thereby entitled to a total current judgment against Defendants Danube Valley Exports, LLC, Vicki W. Smith, and William Smith, in the amount of \$49,361.89 and the Clerk of Court is directed to enter judgment in favor of Plaintiff Elizabeth Livingston in this amount.

6. Plaintiff is entitled to post-judgment interest at the statutory legal rate of interest as set forth by the annual order of the South Carolina Supreme Court regarding interest rates on money decrees and judgments until said judgment has been fully satisfied.

7. Pursuant to the lease agreement, Defendants Danube Valley Exports, LLC, Vicki W. Smith, and William Smith shall be liable to Plaintiff for any deficiency had in her attempt to relet the premises during the lease period that terminates on September 30, 2013.

8. This matter is hereby referred to the Charleston County master-in-equity for the remainder of the lease period, terminating on September 30, 2013. During the remainder of the lease period, the Charleston County master-in-equity shall, upon motion by Plaintiff, make a determination as to all monies owed to Plaintiff by Defendants, pursuant to the lease agreement.

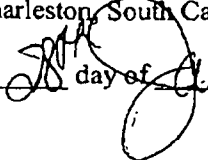
AND IT IS SO ORDERED.


JUDGE HARRINGTON
CIRCUIT COURT JUDGE

13

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG
CLERK, C.P., O.D. & F.C.
By _____
DEPUTY CLERK

Charleston, South Carolina

 day of January 2010



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

cover letter
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608.

Defendants.

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

AND IT IS SO ORDERED.

D. L. Joss
Presiding Judge, Ninth Judicial Circuit

Appendix Page 19
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1880/09.

Charleston, South Carolina

11/10, 2009

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2042

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

LEASE AGREEMENT

THIS LEASE AGREEMENT, is made and entered into as of Sept. 17, 2008 between Elizabeth Livingston as trustee, (hereinafter referred to as the "Landlord") and Danube Valley Exports (hereinafter referred to as the "Tenant").

WITNESSETH:

1. **Premises:** The Landlord hereby leases to the Tenant and the Tenant hereby leases from the Landlord, 750 SF of first floor retail space Exhibit "B", Description of Premises (hereinafter referred to as the "Premises" or as the "Building") located at 163 King Street, Charleston, South Carolina.

TO HAVE AND TO HOLD THE PREMISES upon the terms and conditions hereinafter set forth.

2. **Term:** The initial term of this Lease shall be for a period of five (5) years and shall commence on October 1, 2008, and shall expire on September 30, 2013 unless sooner terminated as hereinafter provided. The date on which the term commences is referred to as the "Commencement Date".

3. **Option to Extend Term:** Tenant is given the option to extend the term on all the provisions contained in this Lease, except for the rent as provided in Paragraph 4, for one (1) successive period of 5 Years ("extended term") following expiration of the initial term, by giving notice of exercise of the option ("option notice") to Landlord at least ninety (90) days but no more than six (6) months before the expiration of the term. Provided that, if Tenant is in default on the date of giving the option notice, the option notice shall be totally ineffective, or if Tenant is in default on the date the extended term is to commence, the extended term shall not commence and this Lease shall expire at the end of the initial term.

4. **Rent:** During the initial first Five year term hereof, the Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500 base + \$648.95 taxes, insurance and streetscape) for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, (hereinafter referred to as the "Rent") on the first day of each and every calendar month during the initial term and extensions with the first monthly installment to be made at the time of execution of this lease (SEE ATTACHED RENT SCHEDULE). Tenant will be given the first two months rent free in lieu of any Tenant up fit by Landlord.

All rent payments shall be made to Landlord at Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414 or at such other place as the Landlord may designate in writing to Tenant. All rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance, occurring from the first day of every month for which rental is due but unpaid. Said delinquency charge shall be subject to the default provisions herein.

5. **Security Deposit:** The Tenant will deposit with the Landlord the sum of \$2,500 as security for the performance by Tenant of all the terms, covenants and conditions of this lease, payment due upon execution of this lease agreement. Landlord shall have the right to apply any part of said deposit to cure any default of Tenant, and if Landlord does so, Tenant shall, upon demand, deposit with the Landlord the amount so applied, that the Landlord shall have the full deposit on hand at all times during the term of this Lease, except as provided below. In the event of a sale of the Building or a lease of the Building, subject to this Lease, Landlord shall have the right to transfer the security to the vendee or lessee, and Landlord shall thereupon be released from all liability for the return of such security and Tenant shall look to the new Landlord solely for the return of said, the security and this provision shall apply to every transfer of assignment made of the security to a new Landlord. The security deposited under this Lease shall not be assigned or encumbered by Tenant without the written consent of Landlord and any such assignment or encumbrance shall be void. The security deposited by Tenant hereunder shall not bear interest.

6. **Use:** The Tenant shall use and occupy the Premises solely for the operation of Art, Crystal, Porcelain, and Decorative Items Gallery and a Travel Desk, to include its related operations; and shall comply with all laws, ordinances, orders, or regulations of any lawful authority having jurisdiction over the Premises and the use thereof. Any other use will require prior written consent of Landlord, which cannot be unreasonably withheld.

7. Assignment, Encumbering, and Subletting: The Tenant shall not without the prior written consent of the Landlord which cannot be unreasonably withheld, assign or encumber this lease or any interest therein, or sublet the Premises or any part thereof, or permit the use of the Premises by any other than the Tenant. Any assignment, encumbrance or sublease without Landlord's consent shall be void and, shall constitute a default. Landlord shall always retain the ability to assign his interest in this Lease.

8. Improvements: All improvements, alterations, and additions to the premises desired by Tenant shall be made only at Tenant's expense, in good and workmanlike manner and in accordance with plans and specifications which have been previously approved in writing by the Landlord. All improvements and additions made by the Tenant and permanently attached to the Premises, including without limitation all partitions, carpets, lighting fixtures, doors, hardware, shelves, cabinets and ceiling, shall remain in the Premises and shall be surrendered to Landlord at the expiration or earlier termination of this lease.

9. Inspection, Delivery and Acceptance of Possession: Delivery of the Possession shall be on October 1, 2008. However, delivery shall not occur prior to receipt by the landlord of the first month's rent and the security deposit as described herein.

a) Tenant may enter the premises to inspect and measure the Premises. Upon and after such entry by Tenant, all of Tenant's obligations under this lease shall apply. Tenant may install its fixtures and perform other work required to ready the Premises for opening. All entry on the Premises by Tenant, and all work done by Tenant, shall be done at Tenant's sole risk. All work performed by Tenant shall be in accordance with good construction practices, applicable legal Requirements and Insurance Requirements.

b) Within fifteen (15) days after Delivery of Possession, Tenant shall give Landlord written notice of any Premises defects. Any defect not set forth in such notice within a fifteen (15) day period shall be deemed waived by Tenant. If Tenant gives Landlord notice during the fifteen (15) day period, the Premises shall be deemed accepted by Tenant subject to the defects.

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises; or the uses to which the leased property may be put. The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personality, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring thereto, or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

10. Utilities and Services: The Tenant shall pay or cause to be paid all charges for heat, water and sewer, solid waste, storm water, gas, electricity, light, telephone, or any other communication or utility service used in or rendered or supplied to the desired Premises throughout the term of this lease, and to indemnify the Landlord and save it harmless against any liability or damage on such account.

11. Maintenance: Tenant shall make and pay for all repairs to the Premises except structural load bearing walls, roof and exterior facade unless repairs to structural load bearing walls, roof and exterior facade become necessary as the result of damage, neglect or abuse by Tenant. Tenant shall replace all things necessary to keep Premises in good state of repair, such as (but not limited to) all fixtures, furnishings, lighting, doors and store signs of Tenant. Tenant shall also maintain and keep in good repair all air conditioning, plumbing, heating and electrical installations and floor surfaces which service the Premises. Tenant shall be responsible for the first \$300 (of each occurrence) of repairs to the HVAC system, Plumbing or Electrical Systems. Landlord will pay for repairs beyond \$300 (of each occurrence) of repairs to the HVAC, Plumbing, and Electrical systems unless the repairs are needed due to Tenant's negligence. Tenant will be required to pay for an annual service contract by a certified HVAC technician on the HVAC system to include a quarterly inspection and filter change. Tenant shall at all times keep the Premises (including maintenance and cleaning of exterior entrances, all glass and show window moldings, signs and bulkheads) and all partitions, doors, floor surfaces, fixtures, equipment and appurtenances thereof in good order, condition and repair, and in a reasonable satisfactory condition of cleanliness, including reasonably periodic painting of the interior of the Premises, damage by unavoidable casualty excepted, and Tenant shall make such other necessary repair in and to the Premises.

If Tenant refuses or neglects to repair properly as required hereunder and to the reasonable satisfaction of Landlord as soon as reasonably possible after written demand, Landlord may make such repairs with liability to Tenant for any loss or damage that may accrue to Tenant's furniture, fixtures, or other property or to Tenant's business by reason hereof, and upon completion thereof, Tenant shall pay Landlord's cost for making such repairs plus twenty (20%) percent for overhead, upon presentation of a bill therefore, as additional rent. Such bill shall include interest at the highest permissible non-usurious rate under the laws of the State of South Carolina, or, if there is none, then at the prime rate of interest charged

during such period by Bank America of South Carolina, Charleston, SC on the cost from the date of completion of repairs by Landlord.

12. Property of Tenant: Tenant may, and at the expiration or earlier termination hereof shall, remove all furniture, equipment, and other personal property which Tenant shall have placed in the Premises; provided that Tenant shall repair any damage to the Premises caused by such removal. All such property shall, during the term thereof, be at the risk of Tenant only, and Landlord shall not be liable for any loss thereof or damage thereto resulting from any cause whatsoever; and each policy of insurance covering such property shall contain a standard waiver of subrogation endorsement. Any such property not removed at the expiration or earlier termination of this Lease shall be deemed abandoned and may be disposed of by the Landlord in any manner whatsoever.

13. Insurance: Tenant shall pay the cost of any premium amounts above standard rates for such insurance occasioned by the nature of Tenant's use of the Premises. Tenant shall obtain and maintain a comprehensive policy of liability insurance with respect to the Premises naming Landlord and any designee of Landlord as additional insured and protecting Landlord, Tenant and any designee of Landlord against any liability which arises from any occurrence on or about the Premises or any appurtenance thereof, or any of the Claims against which Tenant is required to indemnify Landlord. The coverage limits shall be at least Two Million Dollars (\$2,000,000.00) with respect to combined single limit of bodily injury and property damage per occurrence. The Tenant will not cancel or change the insurance without first giving Landlord thirty (30) days prior written notice. Tenant shall provide Certification of Insurance to Landlord with the execution of this Lease and annually and/or with each renewal for the term of this Lease.

14. Damage or Destruction by Casualty: If the Premises are wholly or partially destroyed by fire or other casualty, rental shall abate in proportion to the loss of use thereof. Landlord shall, at its own expense, promptly restore the Premises to substantially the same condition as existed before damage or destruction, whereupon full rental shall resume, unless said damage was caused by Tenant's negligence, in which case any repair shall be at Tenant's expense; provided, however, Landlord may give notice to Tenant within ninety (90) days after the date of such damage or destruction elect, at its option, not to restore or repair the premises and Landlord or Tenant may thereafter, at its option, cancel this lease.

16. Indemnity: Tenant shall defend, indemnify and hold harmless the Landlord from and against any claims, damages, or expenses, whether due to damage to the Premises, claims for injuries to persons or property, or administrative or criminal action by a governmental authority, where such claims arise out of or from use or occupancy of the Premises by Tenant, its guests, agents, employees or invitee, except where such damage, claims or penalties are caused by the negligence of Landlord, its employees or agents.

17. Landlord's Entry: Landlord may enter the Premises during normal business hours and at such other times as mutually agreed, and in a reasonable manner to inspect or exhibit same, to comply with Landlord's obligations or exercise Landlord's rights under this Lease Agreement, or to make repairs or renovations required in connection with adjoining spaces.

18. Rules and Regulations: Tenant, for itself, its agents and employees, agrees to comply with the Rules and Regulations for the Building attached hereto as Exhibit "A" and made a part hereof, and all such rules and regulations which Landlord may hereinafter from time to time promulgate for the care and protection of the Building and the safety, comfort and welfare of its occupants. If any of such Rules and Regulations conflict with any of the provisions of the Lease Agreement, the Lease Agreement shall control. Landlord shall not be liable for the failure of any person to comply with such Rules and Regulations.

19. Default and Remedies: If Tenant shall fail to pay rent when due, or any other sums of money becoming due hereunder, or if Tenant shall default in the performance of any other of the terms, conditions, or covenants contained in this Lease Agreement to be observed or performed by it and does not remedy such default within ten (10) days after written notice thereof or does not, within such ten (10) days, commence such act or acts as shall be necessary to remedy a default, and shall not complete such act or acts within thirty (30) days after written notice, or if Tenant shall become bankrupt or insolvent, or file any debtor proceedings, or file in any court pursuant to any statute, either of the United States or of any state a petition in bankruptcy or insolvency or for reorganization, or file or have filed against it a petition for the appointment of a receiver or trustee for all or substantially all of the assets of Tenant, or if Tenant makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement, or if Tenant shall abandon the Premises or suffer the Lease to be taken under any writ of execution and such writ is not vacated or set aside within fifteen (15) days, then in any such event the Landlord shall have the immediate right to terminate and cancel this Lease. If Landlord should elect to reenter as herein provided, or should it take possession pursuant to legal proceedings, it may either terminate this Lease or it may

from time to time without terminating this Lease, relet the Premises for such term and at such rentals and upon such other terms and conditions as the Landlord may deem advisable. If such reletting shall yield rentals insufficient for any month to pay the rental due by Tenant hereunder for that month, Tenant shall be liable to Landlord for the deficiency and same shall be paid monthly. No such reentry or taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease unless written notice of such intention be given by the Landlord to the Tenant at the time of such reentry; but, notwithstanding any such reentry and reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. If as a result of Tenant's default hereunder, Landlord shall institute legal proceedings for the enforcement of Tenant's obligations, Tenant shall pay all costs incurred by Landlord, including reasonable attorney's fees.

20. Remedies Cumulative-Non-Waiver: No remedy herein or otherwise conferred upon or reserved to Landlord or Tenant shall be considered exclusive of any other remedy, but the same shall be distinct, separate and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity; and every power and remedy given by this Lease Agreement may be exercised from time to time as often as occasion may arise or as may be deemed expedient. No delay or omission of Landlord to exercise any right or power arising from any default, or an acquiescence therein. The acceptance of rent by Landlord with knowledge of a default by Tenant hereunder shall not constitute a waiver of such default.

21. Quiet Enjoyment: If Tenant shall pay rent and perform and observe all of the other covenants and conditions to be performed and observed by it hereunder, Tenant shall at all times during the term hereof have the peaceable and quiet enjoyment of the Premises without interference from Landlord or any person lawfully claiming through Landlord, subject, however, to the terms of this Lease Agreement and any mortgages or deeds of trust provided for in Paragraph 23 hereof.

22. Estoppel Certificate: Within ten (10) days after written request thereof by the Landlord or any mortgagee or trustee under a mortgage or deed of trust covering the Premises, Tenant shall deliver in recordable form a statement to any mortgagee, trustee or other transferee, or to Landlord, certifying any facts that are then true with respect to this Lease Agreement, including without limitation (if such be the case) that this Lease Agreement is in full force and effect, that Tenant is in possession, that Tenant has commenced the payment of rent, and that Tenant claims no defense or set-off to the due and full performance of its obligations under this Lease Agreement.

23. Subordination and Attornment: Tenant agrees that this Lease shall be subject and subordinate to any mortgages, deeds of trust or any ground lease now or hereafter placed upon the Premises and to all modifications thereto; and to all present and future advances made with respect to any such mortgage or deed of trust, and to the purchaser at a sale pursuant to the foreclosure thereof, and to the lessor in the event of a termination of any such ground lease.

24. Notices: All notices provided for in this Lease Agreement shall be in writing and shall be deemed to be given when sent by regular mail, postage prepaid, and addressed as follows:

If to Landlord: Elizabeth Livingston c/o Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414

If to Tenant:

Notices shall also be sent to the holder or holders of any mortgage or deed of trust covering the Premises at such address as such holder or holders may have given by notice as herein provided. Either party hereto, or any such holder, may from time to time, by notice as herein provided, designate a different address to which notices to it shall be sent.

25. Governing Law: This Lease Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina.

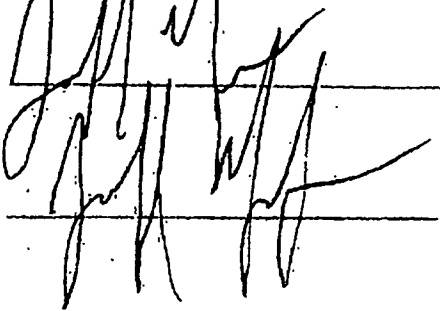
26. Successors: This Lease Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and permitted assigns, except as otherwise provided for in this Lease Agreement.

27. Nature and Extent of Lease: This Lease Agreement, including the exhibits attached hereto, contains the complete agreement between the parties regarding the terms and conditions of the lease and of the understandings or other agreements pertaining thereto which have not been incorporated herein. This Lease Agreement may be modified only by written instrument duly executed by both parties or their respective successors in interest.

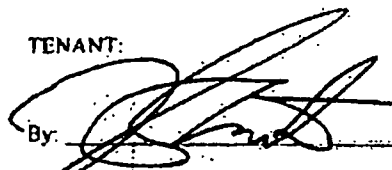
IN WITNESS WHEREOF, the parties hereto have hereunto set their respective Hands and Seals on the day and year first written above.

SEE ATTACHED ~~SIGNATURE PAGE AND~~ PERSONAL
GUARANTEE PAGE

WITNESS AS TO TENANT:



TENANT:

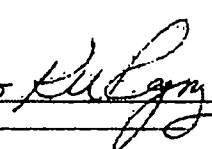
By: 

Name: Vicki Smith

Its: OWNER

Date: 9-17-08

WITNESS AS TO LANDLORD:

~~SEE ATTACHED~~ 

9-17-08

LANDLORD: Elizabeth Luyt

~~SEE ATTACHED~~

Date: 9-17-08

Guaranty

In consideration of the letting of the premises (163 King Street) within mentioned to the within named Tenant (Danube Valley Exports), the undersigned hereby covenants and agrees to and with Landlord, and the said Landlord's legal representatives, successors, and assigns, that if default shall at any time be made by Tenant in the payment of the rent or the performance of the covenants contained within the Lease on Tenant's part to be paid or performed, the undersigned will well and truly pay the said rent or any arrears thereof that may remain due unto Landlord, and also all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance of said covenants, or any of them without requiring notice of any such default from Landlord, and this liability of the undersigned shall continue notwithstanding any forbearance, waiver, or any amendment of the lease or the insolvency or bankruptcy of Tenant. The undersigned, for itself, its heirs, executors, and assigns, hereby expressly agrees that the said Landlord and Tenant, their successors or assigns may make such changes, as may be agreed upon between them with respect to any of the terms, covenants, conditions, agreements, or provisions of the lease without notice to or consent from the undersigned as guarantor.

The undersigned hereby further covenants and agrees with Landlord, its successors, and assigns that the undersigned may be joined in any action Tenant in connection with said lease, and that recovery may be had against undersigned in such action or any independent action against undersigned without Landlord having first exhausted any remedy or claim against Tenant, its successors or assigns.

It is understood that other agreements similar to this agreement may be executed by other persons with respect to the Lease. This agreement shall be cumulative of any such other agreements and the liabilities and obligations of the undersigned hereunder shall in no event be affected or diminished by reason of such other agreement.

This agreement shall be binding upon the undersigned and the successors, heirs, executors, and administrators of the undersigned, and shall inure to the benefit of Landlord and its successors and assigns.

Witness

Witness

Signed, sealed and delivered in the presence of

Guarantor

Guarantor

ADDENDUM TO LEASE

In reference to the Lease made and entered into on the 17th day of September, 2008, by and between Elizabeth Livingston, Landlord, and Danube Valley Exports, covering the real property known as: 163 King Street, Charleston SC, 29401.

The undersigned parties hereby agree as follows:

Whereas the lease states in the section under "Rent" that "Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500.00 base + \$648.95 CAM) for the first year"... both parties agree to amend this section as follows:

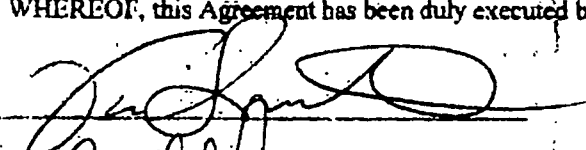
"For the months of March, April & May 2009, Landlord agrees to a reduced rent as follows: \$1,250.00 base plus \$648.95 for a total of \$1,898.95 per month". Approximately ten days before the end of the three month period (May 22, 09), the Landlord (or it's Agent) will meet with the Tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for.

All other covenants and agreements in the original Lease will be in effect.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

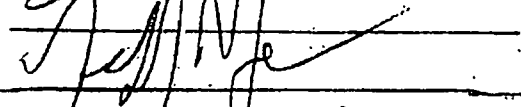
IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

TENNANT:



Date 2-27-09

WITNESS:



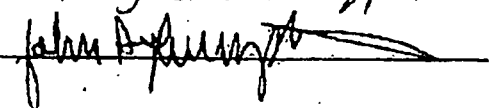
Date 2-27-09

LANDLORD:

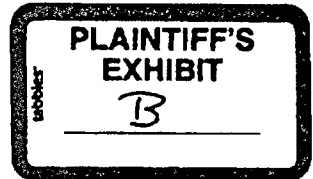


Date 2-25-09

WITNESS:



Date 2/25/09



FILED

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ELIZABETH LIVINGSTON,)
Plaintiff,)
vs.)
DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

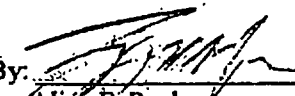
MOTION FOR RULE TO
VACATE OR SHOW CAUSE AND
WRIT OF EJECTMENT AGAINST
DEFENDANT DANUBE VALLEY
EXPORTS, LLC

The Plaintiff, will move before the Presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit ten (10) days after service hereof, at a time, place, and date to be set by the Court, for a rule to vacate or show cause and a writ of ejectment against Defendant Danube Valley Exports, LLC.

Plaintiff originally filed an affidavit and application for ejectment and rule to vacate or show cause against Defendant Danube Valley Exports, LLC ("Danube") in Magistrate's Court, on May 15, 2009, for the non-payment of rent and breach of its lease agreement. Danube answered the affidavit alleging damages in excess of \$7,500, thereby transferring the matter to this Court on June 10, 2009, prior to the issuance of a writ of eviction by the Magistrate. Plaintiff filed an amended summons and complaint on June 25, 2009 in response to Danube's answer, requesting an expedited hearing. While this matter waits to be heard, Defendant remains in the leased commercial premises without paying rent. Defendant is in breach of the lease agreement, has ceased paying rent, and has failed to pay any amount of the past due rent and fees to Plaintiff or as security to this Court since these proceedings began.

Pursuant to S.C. Code Ann §27-37-10 et seq. and the lease agreement at issue, Plaintiff is entitled to a rule to vacate or show cause and a writ of ejectment against Defendant Danube for its continued failure to pay rent to Plaintiff or this Court.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor

Timothy J. W. Muller

134 Meeting Street, Suite 200

Charleston, SC 29401

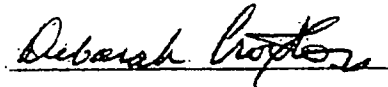
(843) 577-6726

(843) 724-8036 (fax)

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on July 15, 2009, I caused
to be: ☒ mailed
 ☐ hand delivered
 ☐ faxed
 ☐ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

MEMORANDUM IN SUPPORT OF
MOTION FOR RULE TO
VACATE OR SHOW CAUSE AND
WRIT OF EJECTMENT AGAINST
DEFENDANT DANUBE VALLEY
EXPORTS, LLC

FILED
2009 SEP 10 AM 11:32
JULIE B. ARMSTRONG
CLERK OF COURT

Plaintiff Elizabeth Livingston submits the following memorandum of law in support of her motion for a rule to vacate or show cause and writ of ejectment against Defendant Danube Valley Exports, LLC. For the reasons set forth below, this Court should grant Plaintiff's motion.

BACKGROUND

Plaintiff Elizabeth Livingston ("Livingston") is the owner of a small historic building located at 163 King St. Charleston, South Carolina. Livingston and Defendant Danube Valley Exports, LLC ("Danube") entered into a lease agreement for the first floor of the building (the "premises") on September 17, 2008, whereby Danube would occupy the space as tenant. Defendants Vicki W. Smith and William Smith signed personal guaranties to the lease agreement in the event Livingston could not recover rent or damages from Danube. Danube agreed to lease the premises for a period of five (5) years commencing on October 1, 2008.

In the lease agreement, the parties agreed that Danube would pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the

tenant may be allowed to submit to the court a receipt and cancelled check, or both, indicating that payment has been made to the landlord.

S.C. Code Ann § 27-37-155(A). In the event that the amount of rent is in controversy, the court shall preliminarily determine the amount of rent to be paid to the landlord. Id. at § 155(B)(2).

The court is specifically provided with the authority to order the tenant to pay all rent due and accruing as of and during the pendency of the action. See id. at § 155(B)(5). If the tenant fails to make payment as provided in these sections, the tenant's failure to comply entitles the landlord to execution of the judgment for possession. S.C. Code Ann. § 155(B)(5).

The application of these statutes is long overdue in this matter. Pursuant to the rules, Livingston filed an application for eviction and rule to vacate or show cause on May 15, 2009, for Danube's refusal to pay rent. Nevertheless, because of Danube's purported damage counterclaim, this matter was not heard, delayed, and ultimately transferred to circuit court. In order to preserve her rights and seek her statutory remedies, Livingston has been forced to file legal pleadings, incur costs, and endure over four months of legal process for what should have been a simple ejectment matter pursuant to these statutes. In the meantime, Danube has taken advantage of every delay and has likewise occupied the premises rent-free for nearly six months.

S.C. Code Ann § 27-37-10 *et seq.* provides the relief necessary where the tenant refuses to pay rent but remains in the premises. Through the issuance of a rule to show cause and writ of ejectment, which in all likelihood would have been issued by the Magistrate had this matter been heard, this court can provide relief to Livingston. This rule requires Danube to show this court legitimate cause why Danube should not be ejected for remaining in the premises rent-free and in breach of its lease agreement. See id. at § 40. As provided by statute, this rule to show cause and writ of ejectment should further require Danube to pay Livingston all rent owed prior to and after the issuance of the rule. See S.C. Code Ann. § 27-37-155(A).

this matter, causing this motion to be further postponed. Livingston now respectfully requests relief from this court.

LEGAL ANALYSIS

Under the South Carolina ejectment statutes, the landlord or his or her attorney must apply with a court having jurisdiction for a written rule requiring the tenant to vacate the premises or to show cause why the tenant should not be ejected within ten days. S.C. Code Ann. § 27-37-20 (2009). Grounds for ejectment of a tenant occur when the tenant fails or refuses to pay the rent when due or demanded or when the terms or conditions of the lease have been violated. *Id.* at § 30. When a tenant fails to show cause, the judge shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the sheriff of the county. *Id.* at § 40. Section 150 further provides that after the commencement of ejectment proceedings through a rule to vacate or show cause, the rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises. *Id.* at § 150.

In 2006, a specific section was added to address ejectment actions involving commercial lease contract claims and counterclaims. See S.C. Jur. Landlord and Tenant § 57 (2009). This section provides,

(A) In any action involving a commercial lease where the landlord sues for possession and the tenant raises defenses or counterclaims pursuant to this chapter or the lease agreement:

(1) the tenant is required to pay the landlord all rent which becomes due after the issuance of a written rule requiring the tenant to vacate or show cause as rent becomes due and the landlord is required to provide the tenant with a written receipt for each payment except when the tenant pays by check; and

(2) the tenant is required to pay the landlord all rent allegedly owed prior to the issuance of the rule; provided, however, that in lieu of the payment the

Danube argued that the City of Charleston's street beautification project of lower King Street had caused them economic harm. This project is believed to be wholly operated by the City of Charleston and its employees or subcontractors, and Livingston has no control or influence over this project. Moreover, the project had commenced prior to the parties entering into the lease agreement and was thereby a foreseeable event to both parties.

On June 25, 2009, Livingston submitted an amended summons and complaint, asserting causes of action for breach of contract and ejectment of tenants. On July 21, 2009, Defendants submitted an answer and counterclaim, making nearly identical allegations as their earlier answer, but further demanding a jury trial. Defendants again argued that they were entitled to a reduction in rent or should not have to pay rent at all because of their low retail profitability and the City of Charleston's street beautification project. Ironically, Danube failed to pay rent for two of the three months that rent was reduced based on the lease agreement addendum.

Finally, on July 15, 2009, Livingston filed this motion to vacate or show cause and writ of ejectment against Danube. Livingston filed this motion in order to evict Danube for its refusal to pay rent and to recover mounting past due and accruing rent as provided by statute. As owner of the building, Livingston is now paying taxes and insurance on the property but is precluded from recovering any income from her property because of Defendants' conduct. Defendants have occupied the premises for nearly six months without paying rent. By alleging a meritless counterclaim against Livingston and requesting a jury trial, Defendants have succeeded in delaying their ejectment and payment of any rent at Livingston's expense. As of the date of this motion hearing, September 11, 2009, Defendants owe \$17,852.75 in rent and late fees, in addition to reasonable attorney fees and the cost of bringing these proceedings. As a final delay, Defendants secured counsel the afternoon before Livingston's long-awaited motion hearing on

first day of each and every calendar month. The lease agreement further provides that Danube will incur a 15% late fee per month for any rent not received by the fifth (5th) day of each month. In the event of default by Danube, the lease agreement provides that Danube is responsible for all costs incurred by Livingston in bringing legal proceedings to enforce Danube's obligations and reasonable attorney fees. Danube was given the first two months free rent in lieu of any tenant up fit by Livingston, with Danube's first rent being due on December 1, 2008.

Danube paid rent for December 2008, January 2009, and February 2009. On February 27, 2009, after Defendants communicated concerns to Livingston about the poor state of their retail business, Livingston and Danube signed an addendum agreeing that Danube would pay one-half of its normal rent, in the amount of \$1,898.95, for the months of March, April, and May only. Danube paid the one-half rent for March and failed to pay rent due for April. On or about April 22, 2009, after repeated attempts by Livingston to reach Defendants regarding past due rent, Defendant Vicki W. Smith contacted Livingston to inform her they would be unable to pay rent for April. On May 1, 2009, Livingston sent Defendants a certified letter requesting rent payment for April and May and the late fee pursuant to the lease agreement, in the amount of \$4,082.74. Danube submitted a check for \$1,000 to Livingston on May 4, 2009, and has since refused to make further payment.

On May 15, 2009, Livingston applied to eject Danube and for a rule to vacate or show cause in Charleston Magistrate's Court for its breach of the lease agreement. On May 29, 2009, Danube submitted an answer and counterclaim to Livingston's eviction application, prior to the Magistrate's issuance of a rule to vacate or show cause, alleging it had damages in excess of \$7,500 and that this court had jurisdiction over the matter. In support of its damage allegation,

Without the issuance of this rule to vacate or show cause, Livingston will continue to have to pay the expenses on the property during these proceedings while recovering nothing from Danube. Furthermore, Livingston will be unable to relet the premises, as specifically provided by the lease agreement under these circumstances. Livingston, the non-breaching party, presently has no assurance that she will ever recover the mounting past and accruing rent from Danube. Section 155 foresees this situation and obligates a tenant to pay rent where it raises counterclaims in a commercial lease. Id. at § 155(A). Accordingly, this court should provide Livingston the relief afforded to her by statute.

In Defendant's response to Livingston's motion to vacate or show cause and writ of ejectment, the Defendants suggest that because they have requested a jury trial, this court is precluded from issuing a rule to vacate or show cause and writ of ejectment. This argument is another example of Danube's attempt to remain in their retail location rent-free and is not supported by South Carolina law. To the contrary, section 140 provides that "[i]n case any tenant is wrongfully dispossessed he may have an action for damages against the landlord." S.C. Code Ann § 27-37-140. This statute contemplates that a tenant can be ejected for failing to pay rent and thereafter pursue an action for alleged damages, whether by jury or non-jury. To preclude the landlord from seeking the very relief offered by this statutory section whenever a tenant requests a jury trial would lead to an absurd result. See Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) ("The goal of statutory construction is to harmonize conflicting statutes wherever possible . . ."). Ultimately, if the Defendants wish to proceed in their ambiguous claim that Livingston somehow bears responsibility for their retail losses, this claim can be addressed at a jury trial, after the separate issue of a rule to vacate or show cause and writ of ejectment for its refusal to pay rent for six months has been resolved.

ROSEN, ROSEN & HAGOOD, LLC.

By: 

Alice F. Paylor
Timothy J.W. Muller
134 Meeting Street, Suite 200
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

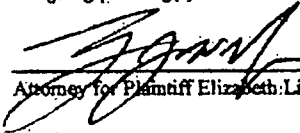
ATTORNEY FOR PLAINTIFF

Charleston, South Carolina

October 12th 2009

CERTIFICATE OF SERVICE

I certify that on Oct. 12, 2009
I caused to be emailed and mailed a true copy of the
foregoing pleading(s) to each counsel of record.


Attorney for Plaintiff Elizabeth Livingston.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
ELIZABETH LIVINGSTON,

Plaintiff.

vs.

DANUBE VALLEY EXPORTS, LLC,
VICKI W. SMITH, and WILLIAM SMITH,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

ORDER

2009 SEP 18 PM 3:55
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Upon reading and considering the pleadings and applicable law in the above captioned matter.

IT IS ORDERED that through the issuance of a rule to vacate or show cause, Defendant Danube Valley Exports, LLC, shall vacate the leased premises, located at 163 King Street Charleston, South Carolina, within ten (10) days from the issuance of this order or a writ of ejectment shall be issued.

IT IS FURTHER ORDERED that pursuant to S.C. Code Ann. § 27-37-155, Danube Valley Exports, LLC, shall pay this court the amount of \$17,852.75 in unpaid rent prior to the issuance of this rule, as determined by the lease agreement entered into on September 17, 2008, and its addendum entered into on February, 27, 2009, between Elizabeth Livingston and Danube Valley Exports, LLC, within forty (40) days from the issuance of this order.

IT IS FURTHER ORDERED that this matter be heard for the term of court immediately following one hundred twenty (120) days from the issuance of this order.

The Honorable Judge Harrington

Charleston, South Carolina
September 14, 2009.

ALBERT A. FINE CORY
JULIE J. ARMSTRONG (REAL)
CLERK OF COURT

DEPUTY CLERK

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)

VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

TO: EBEN H. COCKLEY, ESQUIRE
ATTORNEY FOR DEFENDANTS

PLEASE TAKE NOTICE that Plaintiff Elizabeth Livingston, by and through her undersigned attorney, will move before the Presiding Judge of the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina 29401, or at such other offices as the Court may direct, after ten (10) days from the date of service hereof or at such time and place as the Court may direct, for an Order granting summary judgment as to all causes of action, pursuant to South Carolina Rule of Civil Procedure 56, based on the grounds that there are no questions of material fact left to be resolved by a jury; and because Plaintiffs are entitled to judgment on those uncontested facts as a matter of law.

This motion is supported by a Memorandum of Law to be filed at a later date and is based upon the pleadings in this case, arguments as the Court will allow, Affidavits of Kit Regnery and Timothy J.W. Muller, Esquire, being filed herewith, along with applicable law and any additional evidence the Court may hear and receive at the hearing on this Motion.

FILED
2009 OCT 12 PM 3:25
JULIE J. ARMSTRONG
CLERK OF COURT

5. Defendants Vicki W. Smith and William Smith signed as guarantors to the lease agreement in the event Livingston could not recover rent and/or damages from Defendant Danube. A copy of the guaranty agreements are attached hereto as Exhibit "B."

6. The leased property's location is situated on what is commonly known as the lower section of King Street in Charleston, South Carolina.

7. At an unknown date in 2008, prior to the signing of the lease agreement, the City of Charleston had commenced a highly anticipated street beautification or streetscape project of lower King Street, which to my knowledge, has at all times been wholly conducted and controlled by the City of Charleston and its employees or contractors.

8. Prior to the aforementioned lease agreement, I telephoned Susan Griffin, Project Manager with the City of Charleston's Economic Development Department, for an estimated schedule of the streetscape project.

9. Upon information and belief, Susan Griffin has at all times been the City of Charleston representative pertaining to issues involving the lower King Street streetscape project.

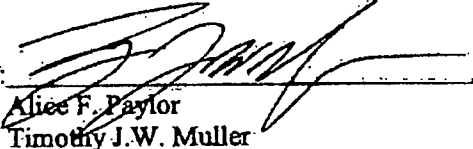
10. Susan Griffin stated that the main impact of the streetscape project for the block of King Street that included Livingston's property was scheduled for October 23, 2008 through November 26, 2008. She further stated that the same block of King Street would later be affected when the sidewalk was replaced and water main was installed, but did not have an estimated timetable for the sidewalk work at that time.

11. I communicated this information to Jeff Yurfest, the real estate agent representing Defendants in their lease of Livingston's commercial property.

CONCLUSION

Because of Danube's breach of the lease agreement and refusal to pay rent, this court should issue a rule to vacate or show cause and writ of ejectment against Defendant Danube Valley Exports, LLC, requiring Danube to pay Livingston all rent allegedly owed prior to and after the issuance of the rule as required by statute.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor

Timothy J.W. Muller

134 Meeting Street, Suite 200

Charleston, South Carolina 29401

Ph: (843) 577-6726

Fax: (843) 724-8036

ATTORNEYS FOR PLAINTIFFS

September 10, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

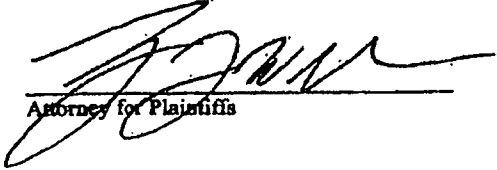
I certify that on September 10, 2009, I caused
to be: ☐ mailed

☒ hand-delivered

☐ faxed

☐ e-mailed

a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**AFFIDAVIT OF
KIT REGNERY**

FILED
2009 OCT 12 PM 3:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PERSONALLY APPEARED before me, Kit Regnery, who after being duly sworn, does state as follows:

1. I am a commercial real estate agent with Batten and Moore, LLC in Charleston, South Carolina.
2. Since 1996, I have specialized in the sale and leasing of retail properties in the Charleston area market.
3. In September of 2008, I was the leasing agent for Plaintiff Elizabeth Livingston's (hereinafter "Livingston") commercial property, located at 163 King Street Charleston, South Carolina.
4. Livingston and Defendant Danube Valley Exports, LLC (hereinafter "Defendant Danube") entered into a five (5) year lease agreement for Livingston's property on September 17, 2008, whereby Defendant Danube agreed to lease Livingston's property as a retail tenant. A copy of the Agreement is attached hereto as Exhibit "A."

12. At an unknown date, the retailers of lower King Street and the City of Charleston agreed to halt all streetscape construction work from late November 2008 through the end of the 2008 calendar year in order to allow the retailers to benefit from the holiday shopping season.

13. Upon information and belief, the Defendants were aware that the streetscape work would impact lower King Street and this project was contemplated upon their signing of the lease agreement.

14. In consideration of the disruption for this ongoing streetscape project and in lieu of any tenant up-fit, Defendant Danube was afforded over two months of free rent in the lease agreement.

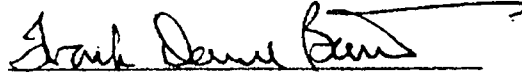
15. In further consideration of the ongoing streetscape project, Livingston and Defendants subsequently agreed to a fifty (50%) percent reduction in rent for the months of March, April and May of 2009.

16. To my knowledge, Defendant Danube stopped paying rent in April of 2009 but remained in Livingston's property through the last week of September 2009.

FURTHER AFFIANT SAYETH NOT.


Kit Regnery

SWORN to before me this
6th day of October, 2009.


Notary Public for South Carolina
My Commission Expires: 9/14/2007

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ELIZABETH LIVINGSTON,)
Plaintiff,)
vs.)
DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**AFFIDAVIT OF TIMOTHY J.W.
MULLER IN SUPPORT OF
ATTORNEY FEES**

FILED
2009 OCT 12 PM 3:25
JULIE J. ARMSTRONG
CLERK OF COURT

PERSONALLY appeared before me Timothy J.W. Muller, who, being duly sworn, deposes and states as follows:

1. I am an attorney with the law firm of Rosen, Rosen & Hagood, LLC and have been licensed to practice law in the State of South Carolina since November of 2008.
2. I, along with my law partner, Alice F. Paylor, have served as counsel for Plaintiff Elizabeth Livingston (hereinafter "Livingston") in the above captioned matter since my firm was retained by Livingston in June of 2009.
3. Livingston entered into a fee agreement with Rosen, Rosen & Hagood, LLC. Livingston is charged \$150.00 per hour for my time, \$300.00 per hour for Alice F. Paylor's time, as well as hourly rates for paralegal time plus all costs incurred for the handling of the case. We keep itemized records of our time.
4. Plaintiff Elizabeth Livingston is responsible for paying all the legal fees billed and costs incurred by Rosen, Rosen & Hagood, LLC on this case from its inception to the present.
5. As of the close of business on Friday, October 9, 2009, the total amount of attorney's fees and litigation costs which have either been invoiced or will be billed by Rosen,

Rosen & Hagood, LLC to Livingston in this action is \$10,836.31.

6. With the filing of this motion for summary judgment, Livingston will continue to incur attorney's fees and litigation costs from Rosen, Rosen & Hagood, LLC in the prosecution of this action. Accordingly, a supplemental affidavit will be thereby submitted to this Court stating a revised total prior to this motion hearing.

7. I believe the above mentioned attorneys fees and costs are recoverable by Livingston against Defendants pursuant to a lease agreement signed and entered into between Livingston and Defendant Danube Valley Exports, LLC (hereinafter "Danube") on September 17, 2008.

8. Under paragraph nineteen (19) of the lease agreement, Danube agreed that if Livingston should be forced to institute legal proceedings for the enforcement of Danube's obligations under the lease agreement, Danube shall pay all costs incurred by Plaintiff, including reasonable attorney's fees. A copy of this lease agreement is attached hereto as Exhibit A.

9. Defendants Vicki W. Smith and William Smith signed as guarantors to the lease agreement in the event Livingston could not recover rent and/or damages from Danube, including but not limited to reasonable attorney fees and costs incurred in bringing this action. A copy of this guaranty is attached hereto as Exhibit B.

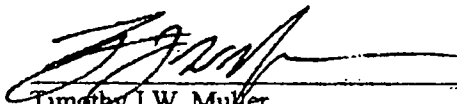
10. Livingston brought this breach of contract and ejectment action against the Defendants as a result of Danube's failure to pay rent and default of the lease agreement.

11. Consequently, I believe Livingston is entitled to the recovery of attorney's fees and costs in the prosecution of this action.

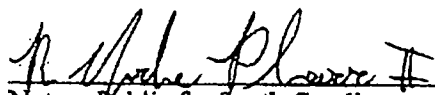
12. I am further of the opinion that the hourly fees charged by my firm for the time devoted to this case by me, Ms. Paylor, and our supporting staff is comparable to the hourly rates

charged by other experienced attorneys practicing in the Charleston, South Carolina area.

FURTHER AFFIANT SAYETH NOT.


Timothy J.W. Muller

SWORN to before me this
12th day of October, 2009.


Notary Public for South Carolina
My Commission Expires: 3/10/2018

ROSEN, ROSEN & HAGOOD, LLC

ATTORNEYS AND COUNSELLORS AT LAW

Timothy J.W. Muller
tmuller@rrhlawfirm.com
(843) 266-8129

134 MEETING STREET, SUITE 200
P.O. BOX 893
CHARLESTON, SOUTH CAROLINA 29402
PHONE (843) 577-6726
FAX (843) 724-8036
www.rrhlawfirm.com

November 6, 2009

HAND DELIVERED

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

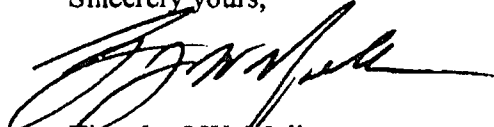
Re: Livingston v. Danube Valley Exports, LLC, et al.
Case No.: 09-CP-10-3608

Dear Julie:

Enclosed please find Plaintiff's Petition for a Rule to Show Cause and Rule to Show Cause against Defendant Danube Valley Exports, LLC., in the above referenced case. I would appreciate your filing the original and returning a clocked-in copy of the Petition to me and forwarding the Rule to Show Cause to the Judge. By copy of this letter, I have also forwarded this to Defendant's counsel.

With kind regards, I am

Sincerely yours,



Timothy J.W. Muller

TJM/dlc
Enclosures

cc: Eben Cockley, Esquire (via hand delivery)
Danube Valley Exports, LLC. (w/enc.)

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON.)

Plaintiff.)

vs.)

DANUBE VALLEY EXPORTS, LLC.)

VICKI W. SMITH, and WILLIAM SMITH.)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

ORDER

2009 SEP 18 PM 3:55
JULIE J. ARMSTRONG
CLERK OF COURT

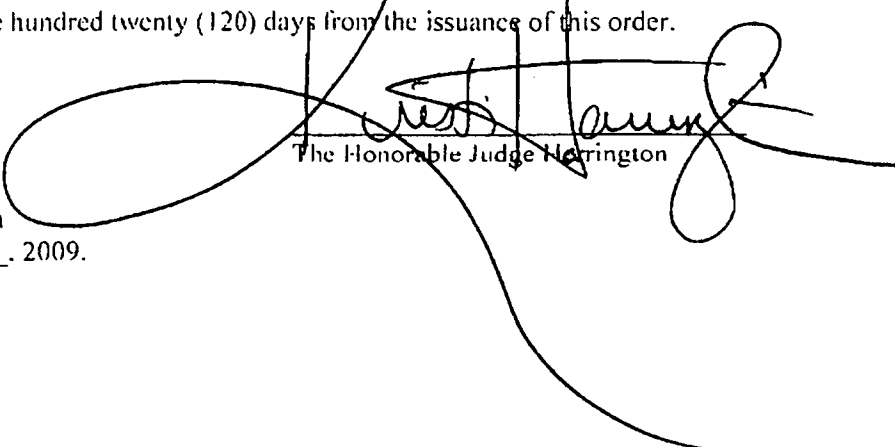
FILED

Upon reading and considering the pleadings and applicable law in the above captioned matter,

IT IS ORDERED that through the issuance of a rule to vacate or show cause, Defendant Danube Valley Exports, LLC, shall vacate the leased premises, located at 163 King Street Charleston, South Carolina, within ten (10) days from the issuance of this order or a writ of ejectment shall be issued.

IT IS FURTHER ORDERED that pursuant to S.C. Code Ann. § 27-37-155, Danube Valley Exports, LLC, shall pay this court the amount of \$17,852.75 in unpaid rent prior to the issuance of this rule, as determined by the lease agreement entered into on September 17, 2008, and its addendum entered into on February, 27, 2009, between Elizabeth Livingston and Danube Valley Exports, LLC, within forty (40) days from the issuance of this order.

IT IS FURTHER ORDERED that this matter be heard for the term of court immediately following one hundred twenty (120) days from the issuance of this order.


The Honorable Judge Harrington

Charleston, South Carolina
September 14, 2009.

STATE OF SOUTH CAROLINA)

IN THE CITY MAGISTRATE'S
COURT

COUNTY OF CHARLESTON)

CASE NO: ~~2009-CI-81-1116~~

ELIZABETH LIVINGSTON)

Plaintiff(s),)

-versus-)

DANUBE VALLEY EXPORTS)

Defendant(s))

ORDER

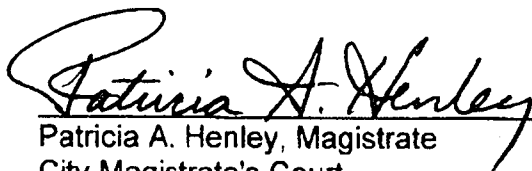
2009 JUN 10 AM 9:55
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

IT APPEARING TO THIS COURT THAT the amount of the COUNTERCLAIM sought by the Defendant if successful would exceed the jurisdictional limit of \$7,500.00 in The City Magistrate's Court:

IT IS THEREFORE ORDERED, that this case is removed from the docket of The City Magistrate's Court and is transferred to the docket of the Charleston County Court of Common Pleas.

IT IS SO ORDERED!


Patricia A. Henley, Magistrate
City Magistrate's Court

Charleston, South Carolina

June 1, 2009

2/8

STATE OF SOUTH CAROLINA

RECEIPT NO: A195965 CASE NO: 09-1116

COUNTY OF CHARLESTON

Elizabeth Livingston

5/27/09

09-CP-10-3008

left message on answering machine
IN THE MAGISTRATE'S COURT

Charleston, SC 29414

PLAINTIFF

Phone: 843 (442-4208)

VS

Danube Valley Exports

163 King Street

Charleston, SC 29401

DEFENDANT

Phone: 843 - 577-6320

AFFIDAVIT AND APPLICATION

FOR EJECTMENT

AND

RULE TO VACATE

OR

SHOW CAUSE

S/C Hearing
6/1/08

@ 9:30 Am

2009 JUN 10 AM 9:55
CLERK OF COURT
JILLIE ARMSTRONG

FILED

Date: 5-15-09

I, the Plaintiff in this action, being sworn, state that I am the landlord - lessor of the premises herein described. I further state that the premises are within the magisterial jurisdiction of Charleston County located at:

163 King St. Charleston, SC 29401

and that a landlord - tenant relationship exist between the parties described as evidenced by the following facts:

2 months unpaid rent - written lease

Grounds for this ejectment are one or more of the following:

(☒) The tenant fails or refuses to pay the rent when due or demanded; or

() The term of tenancy or occupancy has ended; or

(☒) A term or condition of the lease has been violated, to-wit April & May 2009 rent

due = \$4082.74. \$1000. was paid end of April - tenant was sent certified letter of full pmt. due for both months.

SWORN BEFORE ME THIS

15 DAY OF May, 20 09

Marshall Williamson

SIGNATURE OF NOTARY

Elizabeth Livingston

PLAINTIFF

MY COMMISSION EXPIRES 9/22/2013

TO THE DEFENDANT NAMED ABOVE:

Upon application for ejectment, above, filed by the Plaintiff, you the Defendant and lessee of the premises noted above, are ordered to vacate the said premises immediately or to show cause before me at this court located at 995 MORRISON DR. CHARLESTON, SC 29403 within ten (10) days from the date of service of this affidavit and rule why you should not be ejected from the said premises. **FAILURE TO VACATE THE PREMISES OR TO RESPOND TO THIS COURT WITHIN THE TIME PERIOD SET ABOVE, MAY RESULT IN THE ISSUANCE OF A WARRANT OF EJECTMENT AND YOUR PERSONAL PROPERTY BEING PLACED ON THE STREET.**

MAY 15 2009

DATE

C32-800820 (R-12/00)

CITY DISTRICT MAGISTRATE
(843) 724-6719

06-08-2009

CIVIL CASE NUMBER ~~2009-LI-81-001176~~

09-CP-10-36008

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LIVINGSTON, ELIZABETH

PLAINTIFF

VS
EXPORTS
VANUVE VALLEY EXPORTS

Mr. Smith's wife
called her on 6/11
asked wife to
if sent not to.

DEFENDANT

CONSTABLE CERTIFICATE

OF SERVICE

2009 JUN 10 AM 9:55
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

I HEREBY CERTIFY THAT ON THE 19 DAY OF May

AT 133 KING ST.

I SERVED THE ABOVE NAMED

THE APPLICATION FOR EJECTMENT

IN THE WITHIN ACTION BY DELIVERING COPIES THEREOF TO PERSONALLY, AND
LEAVING THE SAME WITH Park

John Barks

CONSTABLE
CHARLESTON COUNTY

I HEREBY CERTIFY THAT I ATTACHED/SEIZED THE

NAMED WITHIN AND LEFT IN STORAGE AT SUBJECT TO

THE ORDER OF THE COURT.

CONSTABLE - CHARLESTON COUNTY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

LEASE AGREEMENT

THIS LEASE AGREEMENT, is made and entered into as of Sept. 17, 2008 between Elizabeth Livingston as trustee, (hereinafter referred to as the "Landlord") and Danube Valley Exports (hereinafter referred to as the "Tenant").

WITNESSETH:

1. **Premises:** The Landlord hereby leases to the Tenant and the Tenant hereby leases from the Landlord, 750 SF of first floor retail space Exhibit "B", Description of Premises (hereinafter referred to as the "Premises" or as the "Building") located at 163 King Street, Charleston, South Carolina.

TO HAVE AND TO HOLD THE PREMISES upon the terms and conditions hereinafter set forth.

2. **Term:** The initial term of this Lease shall be for a period of five (5) years and shall commence on October 1, 2008, and shall expire on September 30, 2013 unless sooner terminated as hereinafter provided. The date on which the term commences is referred to as the "Commencement Date".

3. **Option to Extend Term:** Tenant is given the option to extend the term on all the provisions contained in this Lease, except for the rent as provided in Paragraph 4, for one (1) successive period of 5 Years ("extended term") following expiration of the initial term, by giving notice of exercise of the option ("option notice") to Landlord at least ninety (90) days but no more than six (6) months before the expiration of the term. Provided that, if Tenant is in default on the date of giving the option notice, the option notice shall be totally ineffective, or if Tenant is in default on the date the extended term is to commence, the extended term shall not commence and this Lease shall expire at the end of the initial term.

4. **Rent:** During the initial first Five year term hereof, the Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500 base + \$648.95 taxes, insurance and streetscape) for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, (hereinafter referred to as the "Rent") on the first day of each and every calendar month during the initial term and extensions with the first monthly installment to be made at the time of execution of this lease (SEE ATTACHED RENT SCHEDULE). Tenant will be given the first two months rent free in lieu of any Tenant up fit by Landlord.

All rent payments shall be made to Landlord at Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414 or at such other place as the Landlord may designate in writing to Tenant. All rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance, occurring from the first day of every month for which rental is due but unpaid. Said delinquency charge shall be subject to the default provisions herein.

5. **Security Deposit:** The Tenant will deposit with the Landlord the sum of \$2,500 as security for the performance by Tenant of all the terms, covenants and conditions of this lease, payment due upon execution of this lease agreement. Landlord shall have the right to apply any part of said deposit to cure any default of Tenant, and if Landlord does so, Tenant shall, upon demand, deposit with the Landlord the amount so applied, that the Landlord shall have the full deposit on hand at all times during the term of this Lease, except as provided below. In the event of a sale of the Building or a lease of the Building, subject to this Lease, Landlord shall have the right to transfer the security to the vendee or lessee, and Landlord shall thereupon be released from all liability for the return of such security and Tenant shall look to the new Landlord solely for the return of said, the security and this provision shall apply to every transfer of assignment made of the security to a new Landlord. The security deposited under this Lease shall not be assigned or encumbered by Tenant without the written consent of Landlord and any such assignment or encumbrance shall be void. The security deposited by Tenant hereunder shall not bear interest.

6. **Use:** The Tenant shall use and occupy the Premises solely for the operation of Art, Crystal, Porcelain, and Decorative Items Gallery and a Travel Desk, to include its related operations, and shall comply with all laws, ordinances, orders, or regulations of any lawful authority having jurisdiction over the Premises and the use thereof. Any other use will require prior written consent of Landlord, which cannot be unreasonably withheld.

7. Assignment, Encumbering, and Subletting: The Tenant shall not, without the prior written consent of the Landlord which cannot be unreasonably withheld, assign or encumber this lease or any interest therein, or sublet the Premises or any part thereof, or permit the use of the Premises by any other than the Tenant. Any assignment, encumbrance or sublease without Landlord's consent shall be void and, shall constitute a default. Landlord shall always retain the ability to assign his interest in this Lease.

8. Improvements: All improvements, alterations, and additions to the premises desired by Tenant shall be made only at Tenant's expense, in good and workmanlike manner and in accordance with plans and specifications which have been previously approved in writing by the Landlord. All improvements and additions made by the Tenant and permanently attached to the Premises, including without limitation all partitions, carpets, lighting fixtures, doors, hardware, shelves, cabinets and ceiling, shall remain in the Premises and shall be surrendered to Landlord at the expiration or earlier termination of this lease.

9. Inspection, Delivery and Acceptance of Possession: Delivery of the Possession shall be on October 1, 2008. However, delivery shall not occur prior to receipt by the landlord of the first months rent and the security deposit as described herein.

a) Tenant may enter the premises to inspect and measure the Premises. Upon and after such entry by Tenant, all of Tenant's obligations under this lease shall apply. Tenant may install its fixtures and perform other work required to ready the Premises for opening. All entry on the Premises by Tenant, and all work done by Tenant, shall be done at Tenant's sole risk. All work performed by Tenant shall be in accordance with good construction practices, applicable legal Requirements and Insurance Requirements.

b) Within fifteen (15) days after Delivery of Possession, Tenant shall give Landlord written notice of any Premises defects. Any defect not set forth in such notice within a fifteen (15) day period shall be deemed waived by Tenant. If Tenant gives Landlord notice during the fifteen (15) day period, the Premises shall be deemed accepted by Tenant subject to the defects.

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises, or the uses to which the leased property may be put. The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personally, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring therein, or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

10. Utilities and Services: The Tenant shall pay or cause to be paid all charges for heat, water and sewer, solid waste, storm water, gas, electricity, light, telephone, or any other communication or utility service used in or rendered or supplied to the desired Premises throughout the term of this lease, and to indemnify the Landlord and save it harmless against any liability or damage on such account.

11. Maintenance: Tenant shall make and pay for all repairs to the Premises except structural load bearing walls, roof and exterior facade unless repairs to structural load bearing walls, roof and exterior facade become necessary as the result of damage, neglect or abuse by Tenant. Tenant shall replace all things necessary to keep Premises in good state of repair, such as (but not limited to) all fixtures, furnishings, lighting, doors and store signs of Tenant. Tenant shall also maintain and keep in good repair all air conditioning, plumbing, heating and electrical installations and floor surfaces which service the Premises. Tenant shall be responsible for the first \$300 (of each occurrence) of repairs to the HVAC system, Plumbing or Electrical Systems. Landlord will pay for repairs beyond \$300 (of each occurrence) of repairs to the HVAC, Plumbing, and Electrical systems unless the repairs are needed due to Tenant's negligence. Tenant will be required to pay for an annual service contract by a certified HVAC technician on the HVAC system to include a quarterly inspection and filter change. Tenant shall at all times keep the Premises (including maintenance and cleaning of exterior entrances, all glass and show window moldings, signs and bulkheads) and all partitions, doors, floor surfaces, fixtures, equipment and appurtenances thereof in good order, condition and repair, and in a reasonable satisfactory condition of cleanliness, including reasonably periodic painting of the interior of the Premises, damage by unavoidable casualty excepted, and Tenant shall make such other necessary repair in and to the Premises.

If Tenant refuses or neglects to repair properly as required hereunder and to the reasonable satisfaction of Landlord as soon as reasonably possible after written demand, Landlord may make such repairs with liability to Tenant for any loss or damage that may accrue to Tenant's furniture, fixtures, or other property or to Tenant's business by reason hereof, and upon completion thereof, Tenant shall pay Landlord's cost for making such repairs plus twenty (20%) percent for overhead, upon presentation of a bill therefore, as additional rent. Such bill shall include interest at the highest permissible non-usurious rate under the laws of the State of South Carolina, or, if there is none, then at the prime rate of interest charged

from time to time without terminating this Lease, relet the Premises for such term and at such rentals and upon such other terms and conditions as the Landlord may deem advisable. If such reletting shall yield rentals insufficient for any month to pay the rental due by Tenant hereunder for that month, Tenant shall be liable to Landlord for the deficiency and same shall be paid monthly. No such reentry or taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease unless written notice of such intention be given by the Landlord to the Tenant at the time of such reentry, but, notwithstanding any such reentry and reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. If as a result of Tenant's default hereunder, Landlord shall institute legal proceedings for the enforcement of Tenant's obligations, Tenant shall pay all costs incurred by Landlord, including reasonable attorney's fees.

20. Remedies Cumulative-Non-Waiver: No remedy herein or otherwise conferred upon or reserved to Landlord or Tenant shall be considered exclusive of any other remedy, but the same shall be distinct, separate and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity; and every power and remedy given by this Lease Agreement may be exercised from time to time as often as occasion may arise or as may be deemed expedient. No delay or omission of Landlord to exercise any right or power arising from any default, or an acquiescence therein. The acceptance of rent by Landlord with knowledge of a default by Tenant hereunder shall not constitute a waiver of such default.

21. Quiet Enjoyment: If Tenant shall pay rent and perform and observe all of the other covenants and conditions to be performed and observed by it hereunder, Tenant shall at all times during the term hereof have the peaceable and quiet enjoyment of the Premises without interference from Landlord or any person lawfully claiming through Landlord, subject, however, to the terms of this Lease Agreement and any mortgages or deeds of trust provided for in Paragraph 23 hereof.

22. Enoppel Certificate: Within ten (10) days after written request thereof by the Landlord or any mortgagee or trustee under a mortgage or deed of trust covering the Premises, Tenant shall deliver in recordable form a statement to any mortgagee, trustee or other transferee, or to Landlord, certifying any facts that are then true with respect to this Lease Agreement, including without limitation (if such be the case) that this Lease Agreement is in full force and effect, that Tenant is in possession, that Tenant has commenced the payment of rent, and that Tenant claims no defense or set-off to the due and full performance of its obligations under this Lease Agreement.

23. Subordination and Anticipation: Tenant agrees that this Lease shall be subject and subordinate to any mortgages, deeds of trust or any ground lease now or hereafter placed upon the Premises and to all modifications thereto, and to all present and future advances made with respect to any such mortgage or deed of trust, and to the purchaser at a sale pursuant to the foreclosure thereof, and to the lessor in the event of a termination of any such ground lease.

24. Notices: All notices provided for in this Lease Agreement shall be in writing and shall be deemed to be given when sent by regular mail, postage prepaid, and addressed as follows:

If to Landlord: Elizabeth Livingston c/o Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414

If to Tenant:

Notices shall also be sent to the holder or holders of any mortgage or deed of trust covering the Premises at such address as such holder or holders may have given by notice as herein provided. Either party herein, or any such holder, may from time to time, by notice as herein provided, designate a different address to which notices to it shall be sent.

25. Governing Law: This Lease Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina.

26. Successors: This Lease Agreement shall be binding upon and shall inure to the benefit of the parties herein and their respective heirs, successors and permitted assigns, except as otherwise provided for in this Lease Agreement.

27. Nature and Extent of Lease: This Lease Agreement, including the exhibits attached herein, contains the complete agreement between the parties regarding the terms and conditions of the lease and of the understandings or other agreements pertaining thereto which have not been incorporated herein. This Lease Agreement may be modified only by written instrument duly executed by both parties or their respective successors in interest.

during such period by Bank America of South Carolina, Charleston, SC on the cost from the date of completion of repairs by Landlord.

12. Property of Tenant: Tenant may, and at the expiration or earlier termination hereof shall, remove all furniture, equipment, and other personal property which Tenant shall have placed in the Premises; provided that Tenant shall repair any damage to the Premises caused by such removal. All such property shall, during the term thereof, be at the risk of Tenant only, and Landlord shall not be liable for any loss thereof or damage thereto resulting from any cause whatsoever; and each policy of insurance covering such property shall contain a standard waiver of subrogation endorsement. Any such property not removed at the expiration or earlier termination of this Lease shall be deemed abandoned and may be disposed of by the Landlord in any manner whatsoever.

13. Insurance: Tenant shall pay the cost of any premium amounts above standard rates for such insurance occasioned by the nature of Tenant's use of the Premises. Tenant shall obtain and maintain a comprehensive policy of liability insurance with respect to the Premises naming Landlord and any designee of Landlord as additional insured and protecting Landlord, Tenant and any designee of Landlord against any liability which arises from any occurrence on or about the Premises or any opportuneness thereof, or any of the Claims against which Tenant is required to indemnify Landlord. The coverage limits shall be at least Two Million Dollars (\$2,000,000.00) with respect to combined single limit of bodily injury and property damage per occurrence. The Tenant will not cancel or change the insurance without first giving Landlord thirty (30) days prior written notice. Tenant shall provide Certification of Insurance to Landlord with the execution of this Lease and annually and/or with each renewal for the term of this Lease.

14. Damage or Destruction by Casualty: If the Premises are wholly or partially destroyed by fire or other casualty, rental shall abate in proportion to the loss of use thereof. Landlord shall, at its own expense, promptly restore the Premises to substantially the same condition as existed before damage or destruction, whereupon, full rental shall resume, unless said damage was caused by Tenant's negligence, in which case any repair shall be at Tenant's expense; provided, however, Landlord may give notice to Tenant within ninety (90) days after the date of such damage or destruction elect, at its option, not to restore or repair the premises and Landlord or Tenant may thereafter, at its option, cancel this lease.

15. Indemnity: Tenant shall defend, indemnify and hold harmless the Landlord from and against any claims, damages, or expenses, whether due to damage to the Premises, claims for injuries to persons or property, or administrative or criminal action by a governmental authority, where such claims arise out of or from use or occupancy of the Premises by Tenant, its guests, agents, employees or invitee, except where such damage, claims or penalties are caused by the negligence of Landlord, its employee or agents.

16. Landlord's Entry: Landlord may enter the Premises during normal business hours and at such other times as mutually agreed, and in a reasonable manner to inspect or exhibit same, to comply with Landlord's obligations or exercise Landlord's rights under this Lease Agreement, or to make repairs or renovations required in connection with adjoining spaces.

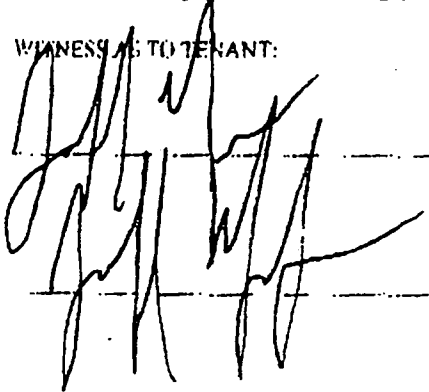
17. Rules and Regulations: Tenant, for itself, its agents and employees, agrees to comply with the Rules and Regulations for the Building attached hereto as Exhibit "A" and made a part hereof, and all such rules and regulations which Landlord may hereinafter from time to time promulgate for the care and protection of the Building and the safety, comfort and welfare of its occupants. If any of such Rules and Regulations conflict with any of the provisions of the Lease Agreement, the Lease Agreement shall control. Landlord shall not be liable for the failure of any person to comply with such Rules and Regulations.

18. Default and Remedies: If Tenant shall fail to pay rent when due, or any other sums of money becoming due hereunder, or if Tenant shall default in the performance of any other of the terms, conditions, or covenants contained in this Lease Agreement to be observed or performed by it and does not remedy such default within ten (10) days after written notice thereof or does not, within such ten (10) days, commence such act or acts as shall be necessary to remedy a default, and shall not complete such act or acts within thirty (30) days after written notice, or if Tenant shall become bankrupt or insolvent, or file any debtor proceedings, or file in any court pursuant to any statute, either of the United States or of any state a petition in bankruptcy or insolvency or for reorganization, or file or have filed against it a petition for the appointment of a receiver or trustee for all or substantially all of the assets of Tenant, or if Tenant makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement, or if Tenant shall abandon the Premises or suffer the Lease to be taken under any writ of execution and such writ is not vacated or set aside within fifteen (15) days, then in any such event the Landlord shall have the immediate right to terminate and cancel this Lease. If Landlord should elect to reenter as herein provided, or should it take possession pursuant to legal proceedings, it may either terminate this Lease or it may

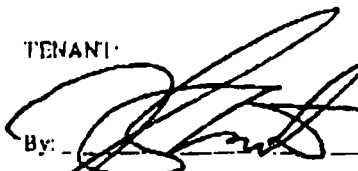
IN WITNESS WHEREOF, the parties hereto have hereunto set their respective Hands and Seals on the day and year first written above.

SEE ATTACHED ~~SIGNATURE PAGE AND~~ PERSONAL
GUARANTEE PAGE

WITNESS AS TO TENANT:



TENANT:

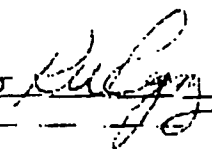
By: 

Name: Vicki Smith

Its: owner

Date: 9-17-08

WITNESS AS TO LANDLORD:

~~SEE ATTACHED~~ 

LANDLORD:

Elizabeth Lough

~~SEE ATTACHED~~

Date: 9-17-08

Guaranty

In consideration of the letting of the premises (163 King Street) within mentioned to the within named Tenant (Danube Valley Exports), the undersigned hereby covenants and agrees to and with Landlord, and the said Landlord's legal representatives, successors, and assigns, that if default shall at any time be made by Tenant in the payment of the rent or the performance of the covenants contained within the Lease on Tenant's part to be paid or performed, the undersigned will well and truly pay the said rent or any arrears thereof that may remain due unto Landlord, and also all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance of said covenants, or any of them without requiring notice of any such default from Landlord, and this liability of the undersigned shall continue notwithstanding any forbearance, waiver, or any amendment of the lease or the insolvency or bankruptcy of Tenant. The undersigned, for itself, its heirs, executors, and assigns, hereby expressly agrees that the said Landlord and Tenant, their successors or assigns may make such changes, as may be agreed upon between them with respect to any of the terms, covenants, conditions, agreements, or provisions of the lease without notice to or consent from the undersigned as guarantor.

The undersigned hereby further covenants and agrees with Landlord, its successors, and assigns that the undersigned may be joined in any action Tenant in connection with said lease, and that recovery may be had against undersigned in such action or any independent action against undersigned without Landlord having first exhausted any remedy or claim against Tenant, its successors or assigns.

It is understood that other agreements similar to this agreement may be executed by other persons with respect to the Lease. This agreement shall be cumulative of any such other agreements and the liabilities and obligations of the undersigned hereunder shall in no event be affected or diminished by reason of such other agreement.

This agreement shall be binding upon the undersigned and the successors, heirs, executors, and administrators of the undersigned, and shall inure to the benefit of Landlord and its successors and assigns.

Witness
Witness

Signed, sealed and delivered in the presence of

Guarantor

Guarantor

MAY 14 2009 9:43AM

Batten & Moore LLC
AMERICA/ TRAVEL CENTER

02-97

No. 5298 P. 8

2415

PO BOX 5008
HILTON HEAD ISLAND, SC 29938
866-714-4478

DATE Sept 19 08

07-448/630 SC
7812

PAY
TO THE
ORDER OF

Elizabeth Livingston

\$5,648.25

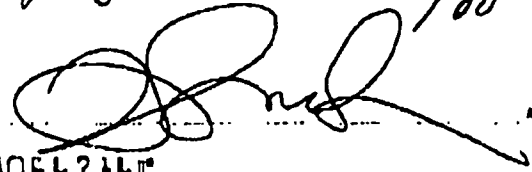
Five thousand, six hundred and forty eight dollars and 25/100

Bank of America

ACH 101 053904483

163 King St.

FOR deposit & 1st month rent



⑈002415⑈ ⑆053904483⑆ 000778064714⑈

ADDENDUM TO LEASE

In reference to the Lease made and entered into on the 17th day of September, 2008, by and between Elizabeth Livingston, Landlord, and Danube Valley Exports covering the real property known as, 163 King Street, Charleston SC, 29401

The undersigned parties hereby agree as follows:

Whereas the lease states in the section under "Rent" that "Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500.00 base + \$648.95 CAM), for the first year"... both parties agree to amend this section as follows:

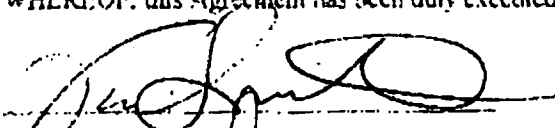
"For the months of March, April & May 2009, Landlord agrees to a reduced rent as follows: \$1,250.00 base plus \$648.95 for a total of \$1,898.95 per month". Approximately ten days before the end of the three month period (May 22, 09), the Landlord (or it's Agent) will meet with the Tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for.

All other covenants and agreements in the original Lease will be in effect.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

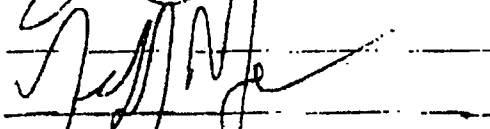
IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

TENNANT:



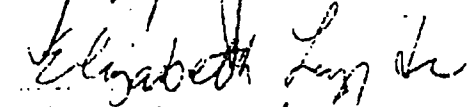
Date 2-27-09

WITNESS:



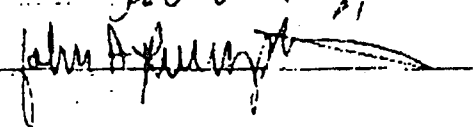
Date 2-27-09

LANDLORD:



Date 2-25-09

WITNESS:



Date 2-25-09

Answer to Affidavit and Application for Ejectment and Rule to Vacate or Show Cause and
Counterclaim of May 31, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE MAGISTRATE'S COURT

09-CP-10-3008
Case No. 2009-CI-81-1116

ELIZABETH LIVINGSTON,
Plaintiff,

vs.

DANUBE VALLY EXPORTS,
Defendant,

ANSWER TO AFFIDAVIT AND
APPLICATION FOR EJECTMENT
AND
RULE TO VACATE OR SHOW
CAUSE AND COUNTERCLAIM

received
6-1-09

2009 JUN 10 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The Defendant, Answering the Application for Ejectment and Rule to Vacate or Show Cause of the Plaintiff, and asserting a Counterclaim against the Plaintiff, would respectfully show unto the Court as follows:

ONE: The Defendant denies all of the allegations of the Plaintiff's Application for Ejectment and Rule to Vacate or Show Cause, unless specifically admitted herein.

FOR A FIRST DEFENSE

TWO: The Defendant is a South Carolina Limited Liability Company and denies the material allegations of the Application for Ejectment and Rule to Vacate or Show Cause.

THREE: The Plaintiff has failed and refused to finish and deliver the premises as set forth in the lease, has failed and refused to provide reasonable commercial access to the property, and therefore is not entitled to ejectment.

FOR A SECOND DEFENSE
And By Way of Counterclaim

FOUR: The allegations of the above paragraphs are incorporated herein and made part hereof as if set forth verbatim.

FIVE: The parties are business entities doing business in Charleston County, South Carolina.

SIX: The parties entered into a lease covering real property located at 163 King Street in the City of Charleston, Charleston County. Construction on King Street improvements and renovations by the City of Charleston was then in progress. The purpose of the lease, expressly known to the Plaintiff, was for the operation by the Defendant of a retail store.

SEVEN: The terms of the lease required the Plaintiff to deliver peaceful occupation of the leased premises to the Defendant, and to provide reasonable commercial access to the property for the Defendant and her customers.

EIGHT: Unknown to the Defendant, but known to the Plaintiff and/or her agents, the city's construction project was and would for an unreasonably long period of time, preclude the Defendant's reasonable commercial use of the property.

NINE: Because of the Plaintiff's actions, the purpose of the lease has been frustrated and the Plaintiff should be precluded from charging rent until the Plaintiff delivers possession of the property to the Defendant as required under the lease.

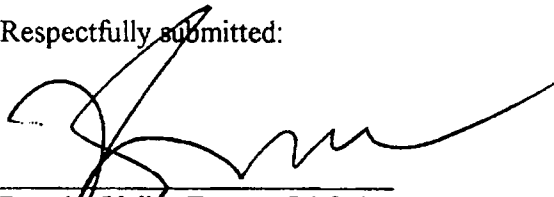
TEN: The actions of the Plaintiff constitute breach of the lease agreement.

ELEVEN: As a direct and proximate result of the Plaintiff's breach of the lease agreement, the Defendant has expended funds and lost business income in such amounts as to greatly exceed the \$7,500.00 jurisdiction of this Court. The Defendant is informed and believes that her claims should be heard in the Circuit Court in connection with the hearing of the Plaintiff's claims.

TWELVE: The Defendant is informed and believes that this counterclaim requires that the case be removed to Circuit Court.

WHEREFORE, the Defendant prays that the Court dismiss the Plaintiff's Application for Ejectment and Rule to Vacate or Show Cause or remove the same to the Circuit Court for Charleston County, award costs and attorneys fees, and for such other and further relief as the Court deems just and proper.

Respectfully submitted:



Danube Valley Exports LLC, by
Its Member Manager

Charleston, South Carolina
May 31, 2009

State of South Carolina
County of Charleston

Case No. ~~09-1116~~
In The Small Claims Court

Elizabeth Livingston
Plaintiff

v.

Affidavit

Danube Valley Exports LLC
Defendant

2009 JUN 10 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Danube Valley Exports LLC leased the property located at 163 King Street, Charleston, SC from Elizabeth Livingston, September 17, 2008. Before signing the lease we asked our agent Jeff Yurfest of Coldwell Banker Commercial to determine how long it would be before the streetscape that is currently going on would be finished. He checked with Batton and Moore, the agent for Elizabeth Livingston and reported to me that the work would be completed by the end of 2008. We signed the lease based on that information. While we were moving in, the adjacent business owners came by the store and in the course of our discussion with them, they revealed that the work would not be finished until August or September 2009. When the streetscape liaison person from the city, Su Griffin, came by for her weekly visit, she confirmed that the construction would not be completed until August 2009 at the earliest. It became apparent at this point that the information provided to our agent by Mrs. Livingston's agent was a material misrepresentation.

We initially began to feel the financial hardship caused by this misrepresentation in early February. We went to our agent and asked that he approach Mrs. Livingston's agent about reducing the rent. He made the contact and Mrs. Livingston agreed to reduce the rent to \$1,898.95 for 3 months beginning March 1, 2009.

During the last two weeks of February and the entire month of March, the sidewalks were removed and replaced by gangways into the entrance of the businesses. They cordoned off an area in the street with pylons and tape to create walkways connecting to the gangways. The contractors then promptly parked their large dump trucks and construction equipment in the walkways they had created blocking all pedestrian traffic. People traveling the sidewalks across the street could not see the storefronts because of the large trucks and equipment and therefore they never ventured across the street. As a result, the businesses on the West side of King Street were void of any pedestrian traffic and therefore had no customers. In April the sidewalks in front of my business were completed, but the northern portion of my block between Clifford Street and Queen Street remained under construction and the trucks and equipment continued to be parked in front of my store.

received
5-87-09

I had never failed to pay our rent on time until April. Around the 20th of April I spoke with Mrs. Livingston on the phone and explained my situation and told her I would do my best to pay the rent before the end of the month. On May 1, 2009 I paid \$1,000.00 toward the rent for April and wrote Mrs. Livingston a letter along with the check indicating I would try to pay the balance for April the next week. I had tried to call her cell phone 3 times to discuss this matter, but I was never able to reach her. Two days after I mailed the \$1,000.00 check I received a certified letter from her stating that she would begin eviction if the April and May rent was not paid within 10 days. The letter was not dated or signed. I wrote Mrs. Livingston another letter indicating all the problems I had encountered due to the street construction and indicating that if she would agree, I would pay her the remaining \$898.95 by May 15, 2009, and if she could give me the opportunity to benefit financially from Spoleto Festival, that we would pay the rent current by the end of the festival. We never received a reply. We then asked our agent Jeff Yurfest to contact Mrs. Livingston's agent and make the same offer through them. This was done and we still received no reply. Once again we ask our agent to contact her agent and his reply was that she was going to move forward with eviction.

It was important that we have some discussion with Mrs. Livingston before June 1, as the addendum to the lease indicated that "Approximately ten days before the end of the three month period (May 22, 2009), the Landlord (or it's agent) will meet with the tenant (or tenant's agent) and determine if an additional period of reduced rent is called for. The situation has been very dire for 5 month and all of the landlords have worked with their tenants and continue to do so. It is very troubling that a landlord would not work with a tenant or even sit down and discuss the situation. It also is hard to understand that a reasonable person would not give a struggling tenant the opportunity to try and make some money during Spoleto Festival, one of the busiest and most profitable 17 days of the year for this city, with the hope of paying the lease current.

In summary, I would like to pay what I owe, but I cannot pay the full amount of the monthly lease beginning June 1. If Mrs. Livingston continues to refuse to meet and discuss the rent for June with me, we are at an impass and I cannot move forward. These are unusual times, the worst this country has seen since the Great Depression. The government, banks and others are all working and making exceptions in an effort to prevent the collapse of businesses. Most landlords would rather work out a flexible method of payment, than have their buildings sit vacant until the economy recovers. There are already 6 vacant buildings on King Street in the block between Clifford Street and Queen Street. Without meeting and reaching agreement my only choice is to vacate the premises. I do not believe I am being unreasonable in light of the material misrepresentation that was made to me by her brokers, Batton and Moore, prior to signing the lease.

I would respectfully request that you schedule a hearing so that we might discuss these issues with the hope of reaching some compromise that would be beneficial to all the parties involved.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vicki W. Smith', followed by a long horizontal line extending to the right.

Vicki W. Smith
Danube Valley Exports LLC

May 27, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

AMENDED SUMMONS

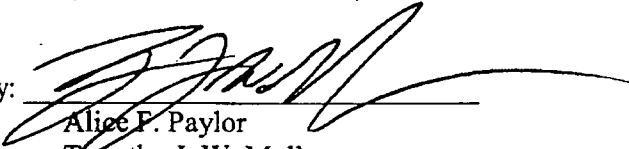
FILED
2009 JUN 25 PM 3:21
JULIE J. ARMSTRONG
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers, Rosen, Rosen & Hagood, at their offices at 134 Meeting Street, Suite 200 (P.O. Box 893), Charleston, South Carolina 29402, within thirty (30) days of the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice P. Paylor
Timothy J. W. Muller
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

Charleston, SC 29402
June 25, 2009

ATTORNEY(S) FOR PLAINTIFF

6. Danube agreed to lease first floor retail space located at 163 King Street, Charleston, South Carolina (hereinafter "the premises") for a period of five (5) years, unless sooner terminated as provided in the Agreement, commencing on October 1, 2008.

7. Defendants Vicki W. Smith and William Smith signed as guarantors to the Agreement in the event Plaintiff could not recover rent and/or damages from Danube, including but not limited to reasonable attorney fees and costs incurred in bringing this action. A copy of the guaranty agreements are attached hereto and included in Exhibit "A".

8. Pursuant to paragraph four (4) of the Agreement, Danube agreed to pay Plaintiff rent of \$3,148.95 in equal monthly installments for the first year of the five (5) year lease, with an increase of 3% for each year of the extended term to be added to the base rent from the previous year, payment being due to Plaintiff on the first day of each month.

9. In the same paragraph, Danube was provided the first two months rent free in lieu of any tenant up-fit.

10. Pursuant to paragraph eleven (11) of the Agreement, Danube agreed to maintain and keep in good repair all air conditioning, plumbing, heating and electrical installations and floor surfaces which service the premises. Danube agreed to pay the first \$300 (of each occurrence) of repairs to the HVAC system, plumbing, and electrical systems. Plaintiff agreed to pay for repairs beyond \$300 (of each occurrence) of repairs to the HVAC, plumbing, and electrical systems unless the repairs are needed due to Danube's negligence.

11. Pursuant to paragraph nineteen (19) of the Agreement, Danube agreed that if it failed to pay rent when due, or any other sums of money becoming due, or if deemed in default in the performance of any other of the terms, conditions, or covenants contained in the Agreement, Plaintiff would have the immediate right to terminate and cancel the Agreement or relet the

premises for the lease period without terminating the Agreement. If Plaintiff elected to relet the premises, Danube agreed to be liable to Plaintiff for any deficiency and the same should be paid monthly. Danube further agreed that if Plaintiff institutes legal proceedings for the enforcement of Danube's obligations, Danube shall pay all costs incurred by Plaintiff, including reasonable attorney's fees.

12. Subsequent to the signing of the Agreement, Danube was provided free rent for the last several weeks of September 2008 in addition to the months of October and November of 2008.

13. On or about October 29, 2008, Plaintiff in good faith paid an invoice from Ashley Services Heating and Air Conditioning Sales and Services for a maintenance check of the heating and air conditioner unit, which Danube was obligated to pay according to the terms of the Agreement. A copy of this invoice is attached hereto as Exhibit "B".

14. Danube paid rent for December 2008, January 2009, and February 2009.

15. On February 27, 2009, after Defendants communicated concerns to Plaintiff with the state of their retail business and delays in the completion of a City of Charleston street beautification project, Plaintiff and Danube signed an addendum agreeing that Danube would pay one-half of its normal rent (\$1,898.95), for the months of March, April and May of 2009 only. A copy of this addendum is attached hereto and included in Exhibit "A".

16. Upon information and belief, the City of Charleston street beautification project of lower King Street is wholly conducted and controlled by the City of Charleston and its employees or contractors.

17. Danube paid the one-half rent for March 2009.

18. Danube failed to pay rent for April 2009.

19. On or about April 22, 2009, after repeated attempts by Plaintiff to reach Defendants regarding past due rent, Defendants Danube and Vicki W. Smith, as Danube's agent of and individually, contacted Plaintiff to inform her they would be unable to pay rent for April.

20. On or about April 29, 2009, Plaintiff contacted her real estate agent in an attempt to secure past due rent from Defendants.

21. On May 1, 2009, Plaintiff sent Defendants Danube and Vicki W. Smith a certified letter requesting rent payment for April and May of 2009 and a late fee pursuant to the Agreement, in the amount of \$4082.74.

22. On or about May 4, 2009, Plaintiff received a check in the amount of \$1000 from Defendants.

23. Thereafter, Defendants failed or refused to pay any further rent or late fees.

24. On May 15, 2009, after failing to recover rent from Defendants, Plaintiff applied to evict Danube in Magistrate's Court.

25. On May 29, 2009, Danube submitted an Answer to Plaintiff's eviction application, asserting it had damages in excess of \$7500 and that this court has jurisdiction over these claims. This court took jurisdiction over this matter on June 10, 2009.

26. As of June 25, 2009, Defendants have not vacated the premises despite their willful failure to pay rent, including a failure to pay the June 2009 rent in the amount of \$3,148.95.

27. Pursuant to applicable law and the Agreement between Plaintiff and Defendants, rent continues to accrue at the rate of \$3,148.95 monthly.

28. Because of Defendants' failure or refusal to pay rent and vacate the premises, Plaintiff is incurring actual and special damages and is further unable to relet the premises.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

29. The Plaintiff repeats and realleges the foregoing allegations as if reiterated verbatim.

30. The Plaintiff states that Defendants are in default of the performance of the terms, conditions, and/or covenants contained in the Agreement and has failed to cure the default.

31. As set forth previously hereinabove, the Defendants contracted with Plaintiff and materially breached the terms of the contract by failing to pay rent and late fees when due.

32. As a direct and proximate cause of the breach of contract, Plaintiff was injured and is entitled to an award of all her actual and special damages as previously set forth in this complaint along with reasonable attorney fees and the cost and expenses of bringing this action.

FOR A SECOND CAUSE OF ACTION

(Ejectment of Tenants)

33. The Plaintiff repeats and realleges the foregoing allegations as if reiterated verbatim.

34. In accordance with the Agreement dated and entered into on September 17, 2008, Plaintiff and Defendant Danube have an express contractual relationship of landlord and tenant.

35. As set forth previously hereinabove, Defendants have failed or refused to pay rent when due and the terms or conditions of the lease have been violated.

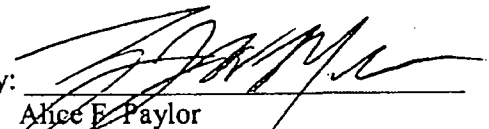
36. The failure or refusal to pay rent is a material breach of the lease agreement and Plaintiff is entitled to a writ of ejectment.

WHEREFORE, the Plaintiff prays for judgment against Defendants as follows:

- a. for a writ of ejectment;
- b. for actual and special damages in an amount to be determined by the trier of fact;

- c. for reasonable attorneys' fees, costs and expenses incurred in the prosecution of this action, pursuant to the lease agreement;
- d. for interest as allowed by law;
- e. for any deficiency Plaintiff may incur as a result of her attempt to relet the premises during the five year lease period; and
- f. for such other and further legal and equitable relief as the Court deems just and proper under the circumstances.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice E. Paylor
Timothy J.W. Muller
134 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-6726
(843) 724-8036 (fax)
ATTORNEYS FOR PLAINTIFF

June 25, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on June 25, 2009, I caused
to be: ☐ mailed
☒ hand delivered
☐ faxed
☐ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

LEASE AGREEMENT

THIS LEASE AGREEMENT, is made and entered into as of Sept. 19, 2008 between Elizabeth Livingston as trustee, (hereinafter referred to as the "Landlord") and Danube Valley Exports (hereinafter referred to as the "Tenant").

WITNESSETH:

1. Premises: The Landlord hereby leases to the Tenant and the Tenant hereby leases from the Landlord, 750 SF of first floor retail space Exhibit "B", Description of Premises (hereinafter referred to as the "Premises" or as the "Building") located at 163 King Street, Charleston, South Carolina.

TO HAVE AND TO HOLD THE PREMISES upon the terms and conditions hereinafter set forth.

2. Term: The initial term of this Lease shall be for a period of five (5) years and shall commence on October 1, 2008, and shall expire on September 30, 2013, unless sooner terminated as hereinafter provided. The date on which the term commences is referred to as the "Commencement Date".

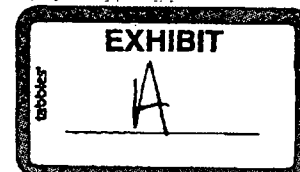
3. Option to Extend Term: Tenant is given the option to extend the term on all the provisions contained in this Lease, except for the rent as provided in Paragraph 4, for one (1) successive period of 5 Years ("extended term") following expiration of the initial term, by giving notice of exercise of the option ("option notice") to Landlord at least ninety (90) days but no more than six (6) months before the expiration of the term. Provided that, if Tenant is in default on the date of giving the option notice, the option notice shall be totally ineffective, or if Tenant is in default on the date the extended term is to commence, the extended term shall not commence and this Lease shall expire at the end of the initial term.

4. Rent: During the initial first Five year term hereof, the Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500 base + \$648.95 taxes, insurance and streetscape) for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year (hereinafter referred to as the "Rent"); on the first day of each and every calendar month during the initial term and extensions with the first monthly installment to be made at the time of execution of this lease (SEE ATTACHED RENT SCHEDULE). Tenant will be given the first two months rent free in lieu of any Tenant up fit by Landlord.

All rent payments shall be made to Landlord at Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414 or at such other place as the Landlord may designate in writing to Tenant. All rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance, occurring from the first day of every month for which rental is due but unpaid. Said delinquency charge shall be subject to the default provisions herein.

5. Security Deposit: The Tenant will deposit with the Landlord the sum of \$2,500 as security for the performance by Tenant of all the terms, covenants and conditions of this lease, payment due upon execution of this lease agreement. Landlord shall have the right to apply any part of said deposit to cure any default of Tenant, and if Landlord does so, Tenant shall, upon demand, deposit with the Landlord the amount so applied, that the Landlord shall have the full deposit on hand at all times during the term of this Lease, except as provided below. In the event of a sale of the Building or a lease of the Building subject to this Lease, Landlord shall have the right to transfer the security to the vendee or lessee, and Landlord shall thereupon be released from all liability for the return of such security and Tenant shall look to the new Landlord solely for the return of said, the security and this provision shall apply to every transfer of assignment made of the security to a new Landlord. The security deposited under this Lease shall not be assigned or encumbered by Tenant without the written consent of Landlord and any such assignment or encumbrance shall be void. The security deposited by Tenant hereunder shall not bear interest.

6. Use: The Tenant shall use and occupy the Premises solely for the operation of Art, Crystal, Porcelain, and Decorative Items Gallery and a Travel Desk, to include its related operations, and shall comply with all laws, ordinances, orders, or regulations of any lawful authority having jurisdiction over the Premises and the use thereof. Any other use will require prior written consent of Landlord, which cannot be unreasonably withheld.



7. Assignment, Encumbering, and Subletting: The Tenant shall not, without the prior written consent of the Landlord, which cannot be unreasonably withheld, assign or encumber this lease or any interest therein, or sublet the Premises or any part thereof, or permit the use of the Premises by any other than the Tenant. Any assignment, encumbrance or sublease without Landlord's consent shall be void and shall constitute a default. Landlord shall always retain the ability to assign his interest in this Lease.

8. Improvements: All improvements, alterations, and additions to the premises desired by Tenant shall be made only at Tenant's expense, in good and workmanlike manner and in accordance with plans and specifications which have been previously approved in writing by the Landlord. All improvements and additions made by the Tenant and permanently attached to the Premises, including, without limitation, all partitions, carpets, lighting fixtures, doors, hardware, shelves, cabinets and ceiling, shall remain in the Premises and shall be surrendered to Landlord at the expiration or earlier termination of this lease.

9. Inspection, Delivery and Acceptance of Possession: Delivery of the Possession shall be on October 1, 2008. However, delivery shall not occur prior to receipt by the landlord of the first month's rent and the security deposit as described herein.

a) Tenant may enter the premises to inspect and measure the Premises. Upon and after such entry by Tenant, all of Tenant's obligations under this lease shall apply. Tenant may install its fixtures and perform other work required to ready the Premises for opening. All entry on the Premises by Tenant and all work done by Tenant shall be done at Tenant's sole risk. All work performed by Tenant shall be in accordance with good construction practices, applicable legal Requirements and Insurance Requirements.

b) Within fifteen (15) days after Delivery of Possession, Tenant shall give Landlord written notice of any Premises defects. Any defect not set forth in such notice within a fifteen (15) day period shall be deemed waived by Tenant. If Tenant gives Landlord notice during the fifteen (15) day period, the Premises shall be deemed accepted by Tenant subject to the defects.

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises, or the uses to which the leased property may be put. The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personality, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring thereto, or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

10. Utilities and Services: The Tenant shall pay or cause to be paid all charges for heat, water and sewer, solid waste, storm water, gas, electricity, light, telephone, or any other communication or utility service used in or rendered or supplied to the desired Premises throughout the term of this lease, and to indemnify the Landlord and save it harmless against any liability or damage on such account.

11. Maintenance: Tenant shall make and pay for all repairs to the Premises except structural load bearing walls, roof and exterior facade unless repairs to structural load bearing walls, roof and exterior facade become necessary as the result of damage, neglect or abuse by Tenant. Tenant shall replace all things necessary to keep Premises in good state of repair, such as (but not limited to) all fixtures, furnishings, lighting, doors and store signs of Tenant. Tenant shall also maintain and keep in good repair all air conditioning, plumbing, heating and electrical installations and floor surfaces which service the Premises. Tenant shall be responsible for the first \$300 (of each occurrence) of repairs to the HVAC system, Plumbing or Electrical Systems. Landlord will pay for repairs beyond \$300 (of each occurrence) of repairs to the HVAC, Plumbing, and Electrical systems, unless the repairs are needed due to Tenant's negligence. Tenant will be required to pay for an annual service contract by a certified HVAC technician on the HVAC system to include a quarterly inspection and filter change. Tenant shall at all times keep the Premises (including maintenance and cleaning of exterior entrances, all glass and show window moldings, signs and bulkheads) and all partitions, doors, floor surfaces, fixtures, equipment and appurtenances thereof in good order, condition and repair, and in a reasonable satisfactory condition of cleanliness, including reasonably periodic painting of the interior of the Premises, damage by unavoidable casualty excepted, and Tenant shall make such other necessary repair in and to the Premises.

If Tenant refuses or neglects to repair properly as required hereunder and to the reasonable satisfaction of Landlord as soon as reasonably possible after written demand, Landlord may make such repairs with liability to Tenant for any loss or damage that may accrue to Tenant's furniture, fixtures, or other property or to Tenant's business by reason hereof, and upon completion thereof, Tenant shall pay Landlord's cost for making such repairs plus twenty (20%) percent for overhead, upon presentation of a bill therefor, as additional rent. Such bill shall include interest at the highest permissible non-usurious rate under the laws of the State of South Carolina, or, if there is none, then at the prime rate of interest charged

from time to time without terminating this Lease, relet the Premises for such term and at such rentals and upon such other terms and conditions as the Landlord may deem advisable. If such reletting shall yield rentals insufficient for any month to pay the rental due by Tenant hereunder for that month, Tenant shall be liable to Landlord for the deficiency and same shall be paid monthly. No such reentry or taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease unless written notice of such intention be given by the Landlord to the Tenant at the time of such reentry, but notwithstanding any such reentry and reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. If as a result of Tenant's default hereunder, Landlord shall institute legal proceedings for the enforcement of Tenant's obligations, Tenant shall pay all costs incurred by Landlord, including reasonable attorney's fees.

20. Remedies Cumulative-Non-Waiver: No remedy herein or otherwise conferred upon or reserved to Landlord or Tenant shall be considered exclusive of any other remedy, but the same shall be distinct, separate and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity, and every power and remedy given by this Lease Agreement may be exercised from time to time as often as occasion may arise or as may be deemed expedient. No delay or omission of Landlord to exercise any right or power arising from any default, or an acquiescence therein. The acceptance of rent by Landlord with knowledge of a default by Tenant hereunder shall not constitute a waiver of such default.

21. Quiet Enjoyment: If Tenant shall pay rent and perform and observe all of the other covenants and conditions to be performed and observed by it hereunder, Tenant shall at all times during the term hereof have the peaceable and quiet enjoyment of the Premises without interference from Landlord or any person lawfully claiming through Landlord, subject, however, to the terms of this Lease Agreement and any mortgages or deeds of trust provided for in Paragraph 23 hereof.

22. Estoppel Certificate: Within ten (10) days after written request thereof by the Landlord or any mortgagee or trustee under a mortgage or deed of trust covering the Premises, Tenant shall deliver in recordable form a statement to any mortgagee, trustee or other transferee, or to Landlord, certifying any facts that are then true with respect to this Lease Agreement, including without limitation (if such be the case) that this Lease Agreement is in full force and effect, that Tenant is in possession, that Tenant has commenced the payment of rent, and that Tenant claims no defense or set-off to the due and full performance of its obligations under this Lease Agreement.

23. Subordination and Attornment: Tenant agrees that this Lease shall be subject and subordinate to any mortgages, deeds of trust or any ground lease now or hereafter placed upon the Premises and to all modifications thereto, and to all present and future advances made with respect to any such mortgage or deed of trust, and to the purchaser at a sale pursuant to the foreclosure thereof, and to the lessor in the event of a termination of any such ground lease.

24. Notices: All notices provided for in this Lease Agreement shall be in writing and shall be deemed to be given when sent by regular mail, postage prepaid, and addressed as follows:

If to Landlord: Elizabeth Livingston c/o Livingston Antiques, 2137 Savannah Hwy, Charleston, SC 29414

If to Tenant:

Notices shall also be sent to the holder or holders of any mortgage or deed of trust covering the Premises at such address as such holder or holders may have given by notice as herein provided. Either party hereto, or any such holder, may from time to time, by notice as herein provided, designate a different address to which notices to it shall be sent.

25. Governing Law: This Lease Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina.

26. Successors: This Lease Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors, and permitted assigns, except as otherwise provided for in this Lease Agreement.

27. Nature and Extent of Lease: This Lease Agreement, including the exhibits attached hereto, contains the complete agreement between the parties regarding the terms and conditions of the lease and of the understandings or other agreements pertaining thereto which have not been incorporated herein. This Lease Agreement may be modified only by written instrument duly executed by both parties or their respective successors in interest.

during such period by Bank America of South Carolina, Charleston, SC on the cost from the date of completion of repairs by Landlord.

12. Property of Tenant: Tenant may, and at the expiration or earlier termination hereof shall, remove all furniture, equipment, and other personal property which Tenant shall have placed in the Premises; provided that Tenant shall repair any damage to the Premises caused by such removal. All such property shall, during the term thereof, be at the risk of Tenant only, and Landlord shall not be liable for any loss thereof or damage thereto resulting from any cause whatsoever, and each policy of insurance covering such property shall contain a standard waiver of subrogation endorsement. Any such property not removed at the expiration or earlier termination of this Lease shall be deemed abandoned and may be disposed of by the Landlord in any manner whatsoever.

13. Insurance: Tenant shall pay the cost of any premium amounts above standard rates for such insurance occasioned by the nature of Tenant's use of the Premises. Tenant shall obtain and maintain a comprehensive policy of liability insurance with respect to the Premises naming Landlord and any designee of Landlord as additional insured and protecting Landlord, Tenant and any designee of Landlord against any liability which arises from any occurrence on or about the Premises or any appurtenance thereof, or any of the Claims against which Tenant is required to indemnify Landlord. The coverage limits shall be at least Two Million Dollars (\$2,000,000.00) with respect to combined single limit of bodily injury and property damage per occurrence. The Tenant will not cancel or change the insurance without first giving Landlord thirty (30) days prior written notice. Tenant shall provide Certification of Insurance to Landlord with the execution of this Lease and annually and/or with each renewal for the term of this Lease.

14. Damage or Destruction by Casualty: If the Premises are wholly or partially destroyed by fire or other casualty, rental shall abate in proportion to the loss of use thereof. Landlord shall, at its own expense, promptly restore the Premises to substantially the same condition as existed before damage or destruction; whereupon full rental shall resume; unless said damage was caused by Tenant's negligence, in which case any repair shall be at Tenant's expense; provided, however, Landlord may give notice to Tenant within ninety (90) days after the date of such damage or destruction, elect, at its option, not to restore or repair the premises and Landlord or Tenant may thereafter, at its option, cancel this lease.

16. Indemnity: Tenant shall defend, indemnify and hold harmless the Landlord from and against any claims, damages, or expenses, whether due to damage to the Premises, claims for injuries to persons or property, or administrative or criminal action by a governmental authority, where such claims arise out of or from use or occupancy of the Premises by Tenant, its guests, agents, employees or invitee, except where such damage, claims or penalties are caused by the negligence of Landlord, its employees or agents.

17. Landlord's Entry: Landlord may enter the Premises during normal business hours and at such other times as mutually agreed and in a reasonable manner to inspect or exhibit same, to comply with Landlord's obligations or exercise Landlord's rights under this Lease Agreement, or to make repairs or renovations required in connection with adjoining spaces.

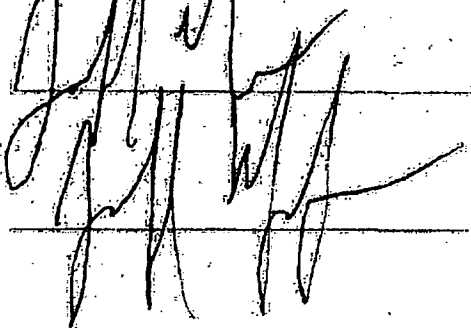
18. Rules and Regulations: Tenant, for itself, its agents and employees, agrees to comply with the Rules and Regulations for the Building attached hereto as Exhibit "A" and made a part hereof and all such rules and regulations which Landlord may hereinafter from time to time promulgate for the care and protection of the Building and the safety, comfort and welfare of its occupants. If any of such Rules and Regulations conflict with any of the provisions of the Lease Agreement, the Lease Agreement shall control. Landlord shall not be liable for the failure of any person to comply with such Rules and Regulations.

19. Default and Remedies: If Tenant shall fail to pay rent when due, or any other sums of money becoming due hereunder, or if Tenant shall default in the performance of any other of the terms, conditions, or covenants contained in this Lease Agreement to be observed or performed by it and does not remedy such default within ten (10) days after written notice thereof or does not, within such ten (10) days, commence such act or acts as shall be necessary to remedy a default, and shall not complete such act or acts within thirty (30) days after written notice, or if Tenant shall become bankrupt or insolvent, or file any debtor proceedings, or file in any court pursuant to any statute, either of the United States or of any state a petition in bankruptcy or insolvency or for reorganization, or file or have filed against it a petition for the appointment of a receiver or trustee for all or substantially all of the assets of Tenant, or if Tenant makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement, or if Tenant shall abandon the Premises or suffer the Lease to be taken under any writ of execution and such writ is not vacated or set aside within fifteen (15) days, then in any such event the Landlord shall have the immediate right to terminate and cancel this Lease. If Landlord should elect to reenter as herein provided, or should it take possession pursuant to legal proceedings, it may either terminate this Lease or it may

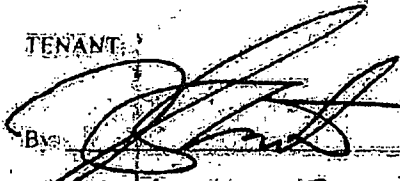
IN WITNESS WHEREOF, the parties hereto have hereunto set their respective Hands and Seals on the day and year first written above.

SEE ATTACHED ~~SIGNATURE PAGE~~ AND PERSONAL
GUARANTEE PAGE

WITNESS AS TO TENANT:



TENANT:

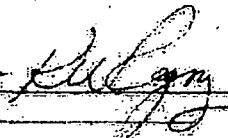
By: 

Name: Vicki Smith

Its: Owner

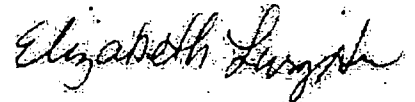
Date: 9-17-08

WITNESS AS TO LANDLORD:

~~SEE ATTACHED~~ 

9-17-08

LANDLORD:



~~SEE ATTACHED~~

Date: 9-17-08

Guaranty

In consideration of the letting of the premises (163 King Street) within mentioned to the within named Tenant (Danube Valley Exports), the undersigned hereby covenants and agrees to and with Landlord, and the said Landlord's legal representatives, successors, and assigns, that if default shall at any time be made by Tenant in the payment of the rent or the performance of the covenants contained within the Lease on Tenant's part to be paid or performed, the undersigned will well and truly pay the said rent or any arrears thereof that may remain due unto Landlord, and also all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance of said covenants, or any of them without requiring notice of any such default from Landlord, and this liability of the undersigned shall continue notwithstanding any forbearance, waiver, or any amendment of the lease or the insolvency or bankruptcy of Tenant. The undersigned, for itself, its heirs, executors, and assigns, hereby expressly agrees that the said Landlord and Tenant, their successors or assigns may make such changes, as may be agreed upon between them with respect to any of the terms, covenants, conditions, agreements, or provisions of the lease without notice to or consent from the undersigned as guarantor.

The undersigned hereby further covenants and agrees with Landlord, its successors, and assigns that the undersigned may be joined in any action Tenant in connection with said lease, and that recovery may be had against undersigned in such action or any independent action against undersigned without Landlord having first exhausted any remedy or claim against Tenant, its successors or assigns.

It is understood that other agreements similar to this agreement may be executed by other persons with respect to the Lease. This agreement shall be cumulative of any such other agreements and the liabilities and obligations of the undersigned hereunder shall in no event be affected or diminished by reason of such other agreement.

This agreement shall be binding upon the undersigned and the successors, heirs, executors, and administrators of the undersigned, and shall inure to the benefit of Landlord and its successors and assigns.

Witness

Witness

Signed, sealed and delivered in the presence of

Guarantor

Guarantor

ADDENDUM TO LEASE

In reference to the Lease made and entered into on the 17th day of September, 2008, by and between Elizabeth Livingston, Landlord, and Danube Valley Exports, covering the real property known as: 163 King Street, Charleston SC, 29401.

The undersigned parties hereby agree as follows:

Whereas the lease states in the section under "Rent" that "Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500.00 base + \$648.95 CAM) for the first year" both parties agree to amend this section as follows:

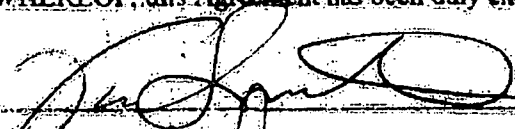
"For the months of March, April & May 2009, Landlord agrees to a reduced rent as follows: \$1,250.00 base plus \$648.95 for a total of \$1,898.95 per month". Approximately ten days before the end of the three month period (May 22, 09), the Landlord (or its Agent) will meet with the Tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for.

All other covenants and agreements in the original Lease will be in effect.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

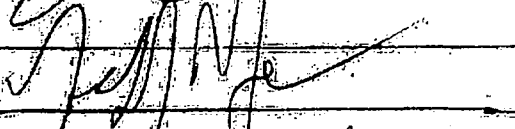
IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

TENNANT:



Date 2-27-09

WITNESS:



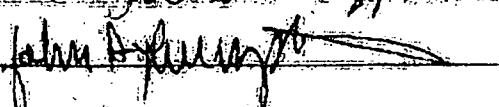
Date 2-27-09

LANDLORD:



Date 2-25-09

WITNESS:



Date 2/25/09

INVOICE #130

ASHLEY SERVICES
HEATING AND AIR-CONDITIONING
SALES AND SERVICE
P.O. BOX 32373, CHAS., S.C. 29417
PHONE 843-766-5407 : FAX 843-402-0897

DATE : OCT. 20, 2008

LIVINGSTON ANTIQUES
2137 SAVANNAH HWY.
CHAS., S.C., 29414

WORK PERFORMED AT *Private Exports*, 163 KING ST., CHAS., S.C.

CHECKED AND FOUND THE UNIT WAS NOT COMING ON BECAUSE THE
THERMOSTAT WAS SET IMPROPERLY.
SET THERMOSTAT; SHOWED TENANT HOW TO OPERATE; AND CHECKED
OPERATION OF UNIT.

TOTAL PRICE \$60.00

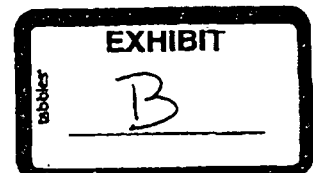
THANKS,
HARRY M. FIELDS
OWNER, ASHLEY SERVICES
STATE MECHANICAL LICENSE # M4032

 **COPY**

*I paid.
Did not charge
tenant.*

PAID
OCT 29 2008

BY:.....



STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
ELIZABETH LIVINGSTON,	)	CASE NO.
X Plaintiff	)	2009-CP-10-3608
	)	
v.	)	MOTION AND ORDER INFORMATION
	)	FORM AND COVER SHEET
DANUBE VALLEY EXPORTS, LLC, VICKI W.	)	
SMITH, AND WILLIAM SMITH	)	
☐ Defendants.	)	

Plaintiff's Attorney: Alice F. Paylor Bar No. 4380 Timothy J.W. Muller, Bar No. 74601 Address: Rosen, Rosen & Hagood, 134 Meeting St., Ste 200, Charleston, SC 29401 phone: 843-577- 6726 fax: 843-724-8036 apaylor@rrhlawfirm.com tmuller@rrhlawfirm.com	Defendant's Attorney: Unknown , Bar No. Address: phone: fax: e-mail: other:
X MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Rule to Vacate or Show Cause and Writ of Ejectment Estimated Time Needed: 15 min Court Reporter Needed: X YES / ☐ NO	
SECTION II: Motion/Order Type X Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☐ Defendant 7/15/09 Date submitted	
SECTION III: Motion Fee X PAID – AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ ☐ MOTION FEE COLLECTED: ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ELIZABETH LIVINGSTON,)
Plaintiff,)
vs.)
DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**MOTION FOR RULE TO
VACATE OR SHOW CAUSE AND
WRIT OF EJECTMENT AGAINST
DEFENDANT DANUBE VALLEY
EXPORTS, LLC**

2009 JUL 15 PM 4:10
JULIE A. STRONG
CLERK OF COURT

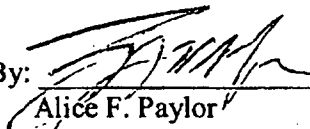
FILED

The Plaintiff, will move before the Presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit ten (10) days after service hereof, at a time, place, and date to be set by the Court, for a rule to vacate or show cause and a writ of ejectment against Defendant Danube Valley Exports, LLC.

Plaintiff originally filed an affidavit and application for ejectment and rule to vacate or show cause against Defendant Danube Valley Exports, LLC ("Danube") in Magistrate's Court, on May 15, 2009, for the non-payment of rent and breach of its lease agreement. Danube answered the affidavit alleging damages in excess of \$7,500, thereby transferring the matter to this Court on June 10, 2009, prior to the issuance of a writ of eviction by the Magistrate. Plaintiff filed an amended summons and complaint on June 25, 2009 in response to Danube's answer, requesting an expedited hearing. While this matter waits to be heard, Defendant remains in the leased commercial premises without paying rent. Defendant is in breach of the lease agreement, has ceased paying rent, and has failed to pay any amount of the past due rent and fees to Plaintiff or as security to this Court since these proceedings began.

Pursuant to S.C. Code Ann §27-37-10 et seq. and the lease agreement at issue, Plaintiff is entitled to a rule to vacate or show cause and a writ of ejectment against Defendant Danube for its continued failure to pay rent to Plaintiff or this Court.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor
Timothy J.W. Muller
134 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-6726
(843) 724-8036 (fax)
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on July 15, 2009, I caused
to be: ☒ mailed
 ☐ hand delivered
 ☐ faxed
 ☐ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.



Deborah Cropper

ROSEN, ROSEN & HAGOOD, LLC

ATTORNEYS AND COUNSELLORS AT LAW

Timothy J.W. Muller
tmuller@rrhlawfirm.com
(843) 266-8129

134 MEETING STREET, SUITE 200
P.O. BOX 893
CHARLESTON, SOUTH CAROLINA 29402
PHONE (843) 577-6726
FAX (843) 724-8036
www.rrhlawfirm.com

July 15, 2009

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

Re: Livingston v. Danube Valley Exports, LLC, et al.
Case No.: 09-CP-10-3608

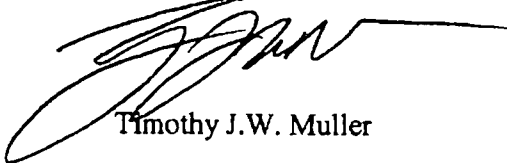
Dear Julie:

Enclosed please find Plaintiff's Motion for a Rule to Vacate or Show Cause and Writ of Ejectment in the above referenced case. I have also enclosed our check for the filing fee in the amount of \$25.00. I would appreciate your filing the original and returning a clocked-in copy to me with my courier.

Thank you for your consideration.

With kind regards, I am

Sincerely yours,



Timothy J.W. Muller

TJM/dlc

Enclosures

cc: Danube Valley Exports, LLC. (w/enc.)
Vicki W. Smith (w/enc.)
William Smith (w/enc.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2009-CP-10-3608

ELIZABETH LIVINGSTON,

Plaintiff,

VS.

ANSWER BY
AND COUNTERCLAIM
JURY TRIAL DEMANDED

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____
(Signature)
JAM NDEB

2009 JUL 22 PM 3:57

7
1
1
3
2

DANUBE VALLEY EXPORTS, VICKI W.)
SMITH, and WILLIAM SMITH,)
Defendants,)

The Defendant, Answering the Amended Complaint of the Plaintiff, and asserting a Counterclaim against the Plaintiff, would respectfully show unto the Court as follows:

ONE: The Defendant denies all of the allegations of the Plaintiff's Amended Complaint, unless specifically admitted herein.

FOR A FIRST DEFENSE

TWO: The Defendants admit the allegations of paragraphs 1, 2, 3, and 4 of the Amended Complaint. As to the allegations of the remaining paragraphs of the Amended Complaint which refer to the lease agreement or other documents, the Defendants crave reference to the said documents, which speak for themselves.

THREE: Answering the remaining allegations of the Amended Complaint, the Defendants will show unto the Court that the Plaintiff has failed and refused to finish and deliver the premises as set forth in the lease, has failed and refused to provide reasonable commercial access to the property, and therefore is not entitled to sue for rent or ejectment.

FOR A SECOND DEFENSE
And By Way of Counterclaim

FOUR: The allegations of the above paragraphs are incorporated herein and made part hereof as if set forth verbatim.

FIVE: The parties are business entities doing business in Charleston County, South Carolina.

SIX: The parties entered into a lease covering real property located on King Street in the City of Charleston, Charleston County. Construction on King Street improvements and renovations by the City of Charleston was then in progress. The purpose of the lease, expressly known to the Plaintiff, was for the operation by the Defendant of a retail store.

SEVEN: The terms of the lease required the Plaintiff to deliver peaceful occupation of the leased premises to the Defendant, and to provide reasonable commercial access to the property for the Defendant and her customers.

EIGHT: Unknown to the Defendant, but known to the Plaintiff and/or her agents, the city's construction project would, for an unreasonably long period of time, preclude the Defendant's reasonable commercial use of the property, and is so precluding such use.

NINE: Because of the Plaintiff's actions, the purpose of the lease has been frustrated and the Plaintiff should be precluded from charging rent until the Plaintiff delivers possession of the property to the Defendant as required under the lease.

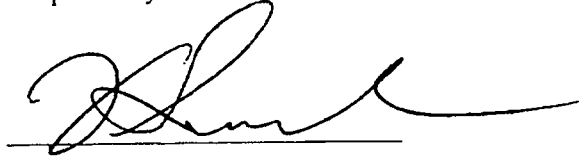
TEN: The actions of the Plaintiff constitute breach of the lease agreement.

ELEVEN: As a direct and proximate result of the Plaintiff's breach of the lease agreement, the Defendants have expended funds and lost business income in such amounts as will be set forth at the trial of this matter.

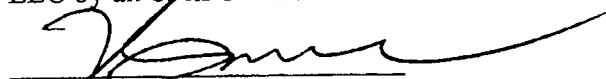
TWELVE: The Defendants are informed and believe that they entitled to a trial by jury in this matter.

WHEREFORE, the Defendant prays that the Court dismiss the Plaintiff's Amended Complaint, for judgment on the Counterclaim, for an award of costs and attorneys fees, and for such other and further relief as the Court deems just and proper.

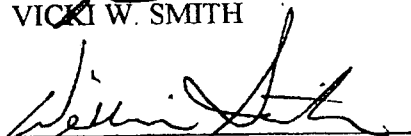
Respectfully submitted:



DANUBE VALLEY EXPORTS,
LLC by all of its owners



VICKI W. SMITH



WILLIAM SMITH

Charleston, South Carolina
July 21, 2009

232 Rutledge Ave
Charleston, SC 29403

5. Answering Paragraph 6, Plaintiff admits that the parties entered into a lease agreement for the real property located on King Street in the City of Charleston, Charleston County, as described in the lease agreement, thereby craving reference to the lease agreement document. Plaintiff further craves reference to paragraph six (6) of the lease agreement that states the permissible use(s) of the leased premises. Any further allegations contained in this paragraph are denied and Plaintiff demands strict proof thereof.

6. As Paragraph 7 interprets the terms of the lease agreement, Plaintiff answers this paragraph by craving reference to the lease agreement, denying any allegation inconsistent therewith and demanding strict proof thereof.

7. Plaintiff denies the allegations of Paragraphs 8, 9, 10, and 11.

8. The allegations of paragraphs 12 assert a conclusion of law and Defendants' prayer for relief and do not require a response from the Plaintiffs; however, to the extent a response is required from the Plaintiffs, the Plaintiffs deny the allegations and demand strict proof thereof.

FOR A SECOND DEFENSE

9. The allegations of the Counterclaims fail to state claims sufficient to constitute causes of action and should, therefore, be dismissed pursuant to Rule 12(b)(6), SCRPC.

FOR A THIRD DEFENSE

10. Defendants are barred from recovering under any of the counterclaims due to the doctrine of unclean hands.

FOR A FOURTH DEFENSE

11. Defendants are barred from recovering under any of the counterclaims due to the doctrine of estoppel.

FOR A FIFTH DEFENSE

12. Defendants are barred from recovering under any of the counterclaims due to the doctrine of waiver.

FOR A SIXTH DEFENSE

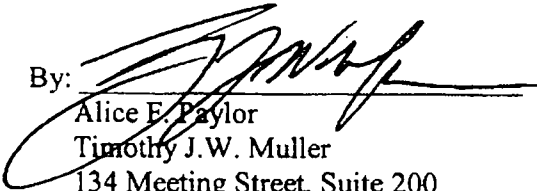
13. Defendants' counterclaims are barred in whole or in part by the applicable statute of limitations for each claim and/or the doctrine of laches.

FOR A SEVENTH DEFENSE

14. Plaintiff reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Defendants' counterclaims, Plaintiff prays that the counterclaims be dismissed, that costs be awarded to her, that the Court award damages and reasonable attorneys' fees to Plaintiff in accordance with her Amended Complaint and for such other and further relief as the Court may deem appropriate.

ROSEN, ROSEN & HAGOOD, LLC

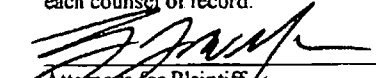
By: 

Alice E. Paylor
Timothy J. W. Muller
134 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-6726
(843) 724-8036 (fax)

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on August 6, 2009, I caused
to be: ☒ mailed
 ☐ hand delivered
 ☐ faxed
 ☐ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.


Attorneys for Plaintiff

FILED
2009 AUG -6 PM 3:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

ROSEN, ROSEN & HAGOOD, LLC

ATTORNEYS AND COUNSELLORS AT LAW

Timothy J.W. Muller
tmuller@rrhlawfirm.com
(843) 266-8129

134 MEETING STREET, SUITE 200
P.O. BOX 893
CHARLESTON, SOUTH CAROLINA 29402
PHONE (843) 577-6726
FAX (843) 724-8036
www.rrhlawfirm.com

August 6, 2009

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

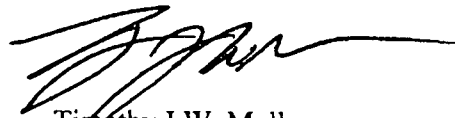
Re: Livingston v. Danube Valley Exports, LLC, et al.
Case No.: 09-CP-10-3608

Dear Julie:

Enclosed please find Plaintiff's Reply to Defendants' Answer and Counterclaim in the above referenced case. I would appreciate your filing the original and returning a clocked-in copy to me with my courier.

With kind regards, I am

Sincerely yours,



Timothy J.W. Muller

TJM/dlc
Enclosures

cc: Danube Valley Exports, LLC. (w/enc.)
Vicki W. Smith (w/enc.)
William Smith (w/enc.)

Response to Motion for Rule to Vacate or Show
Cause and Writ of Ejectment of August 24, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No.: 2009-CP-10-3608

ELIZABETH LIVINGSTON,

Plaintiff,

vs.

DANUBE VALLY EXPORTS, VICKI W.
SMITH, and WILLIAM SMITH,
Defendants,

RESPONSE TO MOTION

2009 AUG 27 PM 12: 31
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

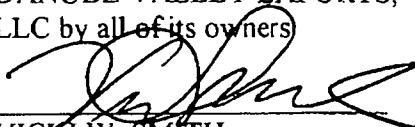
The Defendants, Responding to the Plaintiff's Motion for Rule to Vacate or Show Cause and Writ of Ejectment filed July 15, 2009, would respectfully show unto the Court as follows. This is an action for payment of rent and ejectment. The Defendants have filed an Answer and Counterclaim against the Plaintiff, which if successful, would entitle the Defendants to remain in possession of the premises for some time into the future without the further payment of rent. The Defendants claim, among other claims, that the Plaintiff has failed and continues to fail to deliver quiet enjoyment of, and reasonable commercial access to, the leased premises. The Defendants claim that the substantial investment they have made in the premises, including the past payment of rent and otherwise, together with the substantial damages caused by the Plaintiff's acts and omissions, preclude the relief requested by the Plaintiff.

Further, the matters raised by the parties are factual and interrelated. The Defendants have demanded a jury trial, and the case is docketed for a jury trial. Hearing the Plaintiff's Motion would decide ultimate factual issues in the case, e.g. , ejectment, without a trial and which cannot be later remedied at trial. The resolution of these factual issues is reserved for the trier of fact by the Constitutions of South Carolina and the United States. Accordingly, the Defendants request that the Court dismiss the Plaintiff's Motion without hearing the same.

Respectfully submitted:



DANUBE VALLEY EXPORTS,
LLC by all of its owners



VICKI W. SMITH



WILLIAM SMITH

Charleston, South Carolina
August 24, 2009

Memorandum in Support of Motion for Rule to Vacate or Show Cause
and Writ of Ejectment of September 10, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ELIZABETH LIVINGSTON,)
)
Plaintiff,)
)
vs.)
)
DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**MEMORANDUM IN SUPPORT OF
MOTION FOR RULE TO
VACATE OR SHOW CAUSE AND
WRIT OF EJECTMENT AGAINST
DEFENDANT DANUBE VALLEY
EXPORTS, LLC**

FILED
2009 SEP 10 AM 11:31
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Elizabeth Livingston submits the following memorandum of law in support of her motion for a rule to vacate or show cause and writ of ejectment against Defendant Danube Valley Exports, LLC. For the reasons set forth below, this Court should grant Plaintiff's motion.

BACKGROUND

Plaintiff Elizabeth Livingston ("Livingston") is the owner of a small historic building located at 163 King St. Charleston, South Carolina. Livingston and Defendant Danube Valley Exports, LLC ("Danube") entered into a lease agreement for the first floor of the building (the "premises") on September 17, 2008, whereby Danube would occupy the space as tenant. Defendants Vicki W. Smith and William Smith signed personal guaranties to the lease agreement in the event Livingston could not recover rent or damages from Danube. Danube agreed to lease the premises for a period of five (5) years commencing on October 1, 2008.

In the lease agreement, the parties agreed that Danube would pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the

first day of each and every calendar month. The lease agreement further provides that Danube will incur a 15% late fee per month for any rent not received by the fifth (5th) day of each month. In the event of default by Danube, the lease agreement provides that Danube is responsible for all costs incurred by Livingston in bringing legal proceedings to enforce Danube's obligations and reasonable attorney fees. Danube was given the first two months free rent in lieu of any tenant up fit by Livingston, with Danube's first rent being due on December 1, 2008.

Danube paid rent for December 2008, January 2009, and February 2009. On February 27, 2009, after Defendants communicated concerns to Livingston about the poor state of their retail business, Livingston and Danube signed an addendum agreeing that Danube would pay one-half of its normal rent, in the amount of \$1,898.95, for the months of March, April, and May only. Danube paid the one-half rent for March and failed to pay rent due for April. On or about April 22, 2009, after repeated attempts by Livingston to reach Defendants regarding past due rent, Defendant Vicki W. Smith contacted Livingston to inform her they would be unable to pay rent for April. On May 1, 2009, Livingston sent Defendants a certified letter requesting rent payment for April and May and the late fee pursuant to the lease agreement, in the amount of \$4,082.74. Danube submitted a check for \$1,000 to Livingston on May 4, 2009, and has since refused to make further payment.

On May 15, 2009, Livingston applied to eject Danube and for a rule to vacate or show cause in Charleston Magistrate's Court for its breach of the lease agreement. On May 29, 2009, Danube submitted an answer and counterclaim to Livingston's eviction application, prior to the Magistrate's issuance of a rule to vacate or show cause, alleging it had damages in excess of \$7,500 and that this court had jurisdiction over the matter. In support of its damage allegation,

Danube argued that the City of Charleston's street beautification project of lower King Street had caused them economic harm. This project is believed to be wholly operated by the City of Charleston and its employees or subcontractors, and Livingston has no control or influence over this project. Moreover, the project had commenced prior to the parties entering into the lease agreement and was thereby a foreseeable event to both parties.

On June 25, 2009, Livingston submitted an amended summons and complaint, asserting causes of action for breach of contract and ejectment of tenants. On July 21, 2009, Defendants submitted an answer and counterclaim, making nearly identical allegations as their earlier answer, but further demanding a jury trial. Defendants again argued that they were entitled to a reduction in rent or should not have to pay rent at all because of their low retail profitability and the City of Charleston's street beautification project. Ironically, Danube failed to pay rent for two of the three months that rent was reduced based on the lease agreement addendum.

Finally, on July 15, 2009, Livingston filed this motion to vacate or show cause and writ of ejectment against Danube. Livingston filed this motion in order to evict Danube for its refusal to pay rent and to recover mounting past due and accruing rent as provided by statute. As owner of the building, Livingston is now paying taxes and insurance on the property but is precluded from recovering any income from her property because of Defendants' conduct. Defendants have occupied the premises for nearly six month without paying rent. By alleging a meritless counterclaim against Livingston and requesting a jury trial, Defendants have succeeded in delaying their ejectment and payment of any rent at Livingston's expense. As of the date of this motion hearing, September 11, 2009, Defendants owe \$17,852.75 in rent and late fees, in addition to reasonable attorney fees and the cost of bringing these proceedings. As a final delay, Defendants secured counsel the afternoon before Livingston's long-awaited motion hearing on

this matter, causing this motion to be further postponed. Livingston now respectfully requests relief from this court.

LEGAL ANALYSIS

Under the South Carolina ejectment statutes, the landlord or his or her attorney must apply with a court having jurisdiction for a written rule requiring the tenant to vacate the premises or to show cause why the tenant should not be ejected within ten days. S.C. Code Ann. § 27-37-20 (2009). Grounds for ejectment of a tenant occur when the tenant fails or refuses to pay the rent when due or demanded or when the terms or conditions of the lease have been violated. Id. at § 30. When a tenant fails to show cause, the judge shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the sheriff of the county. Id. at § 40. Section 150 further provides that after the commencement of ejectment proceedings through a rule to vacate or show cause, the rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises. Id. at § 150.

In 2006, a specific section was added to address ejectment actions involving commercial lease contract claims and counterclaims. See S.C. Jur. Landlord and Tenant § 57 (2009). This section provides,

(A) In any action involving a commercial lease where the landlord sues for possession and the tenant raises defenses or counterclaims pursuant to this chapter or the lease agreement:

(1) the tenant is required to pay the landlord all rent which becomes due after the issuance of a written rule requiring the tenant to vacate or show cause as rent becomes due and the landlord is required to provide the tenant with a written receipt for each payment except when the tenant pays by check; and

(2) the tenant is required to pay the landlord all rent allegedly owed prior to the issuance of the rule; provided, however, that in lieu of the payment the

tenant may be allowed to submit to the court a receipt and cancelled check, or both, indicating that payment has been made to the landlord.

S.C. Code Ann § 27-37-155(A). In the event that the amount of rent is in controversy, the court shall preliminarily determine the amount of rent to be paid to the landlord. Id. at § 155(B)(2).

The court is specifically provided with the authority to order the tenant to pay all rent due and accruing as of and during the pendency of the action. See id. at § 155(B)(5). If the tenant fails to make payment as provided in these sections, the tenant's failure to comply entitles the landlord to execution of the judgment for possession. S.C. Code Ann. § 155(B)(5).

The application of these statutes is long overdue in this matter. Pursuant to the rules, Livingston filed an application for eviction and rule to vacate or show cause on May 15, 2009, for Danube's refusal to pay rent. Nevertheless, because of Danube's purported damage counterclaim, this matter was not heard, delayed, and ultimately transferred to circuit court. In order to preserve her rights and seek her statutory remedies, Livingston has been forced to file legal pleadings, incur costs, and endure over four months of legal process for what should have been a simple ejectment matter pursuant to these statutes. In the meantime, Danube has taken advantage of every delay and has likewise occupied the premises rent-free for nearly six months.

S.C. Code Ann § 27-37-10 *et seq.* provides the relief necessary where the tenant refuses to pay rent but remains in the premises. Through the issuance of a rule to show cause and writ of ejectment, which in all likelihood would have been issued by the Magistrate had this matter been heard, this court can provide relief to Livingston. This rule requires Danube to show this court legitimate cause why Danube should not be ejected for remaining in the premises rent-free and in breach of its lease agreement. See id. at § 40. As provided by statute, this rule to show cause and writ of ejectment should further require Danube to pay Livingston all rent owed prior to and after the issuance of the rule. See S.C. Code Ann. § 27-37-155(A).

Without the issuance of this rule to vacate or show cause, Livingston will continue to have to pay the expenses on the property during these proceedings while recovering nothing from Danube. Furthermore, Livingston will be unable to relet the premises, as specifically provided by the lease agreement under these circumstances. Livingston, the non-breaching party, presently has no assurance that she will ever recover the mounting past and accruing rent from Danube. Section 155 foresees this situation and obligates a tenant to pay rent where it raises counterclaims in a commercial lease. Id. at § 155(A). Accordingly, this court should provide Livingston the relief afforded to her by statute.

In Defendant's response to Livingston's motion to vacate or show cause and writ of ejectment, the Defendants suggest that because they have requested a jury trial, this court is precluded from issuing a rule to vacate or show cause and writ of ejectment. This argument is another example of Danube's attempt to remain in their retail location rent-free and is not supported by South Carolina law. To the contrary, section 140 provides that "[i]n case any tenant is wrongfully dispossessed he may have an action for damages against the landlord." S.C. Code Ann § 27-37-140. This statute contemplates that a tenant can be ejected for failing to pay rent and thereafter pursue an action for alleged damages, whether by jury or non-jury. To preclude the landlord from seeking the very relief offered by this statutory section whenever a tenant requests a jury trial would lead to an absurd result. See Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) ("The goal of statutory construction is to harmonize conflicting statutes wherever possible . . ."). Ultimately, if the Defendants wish to proceed in their ambiguous claim that Livingston somehow bears responsibility for their retail losses, this claim can be addressed at a jury trial, after the separate issue of a rule to vacate or show cause and writ of ejectment for its refusal to pay rent for six months has been resolved.

CONCLUSION

Because of Danube's breach of the lease agreement and refusal to pay rent, this court should issue a rule to vacate or show cause and writ of ejectment against Defendant Danube Valley Exports, LLC, requiring Danube to pay Livingston all rent allegedly owed prior to and after the issuance of the rule as required by statute.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Alice F. Paylor
Timothy J.W. Muller
134 Meeting Street, Suite 200
Charleston, South Carolina 29401
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ATTORNEYS FOR PLAINTIFFS

September 10, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

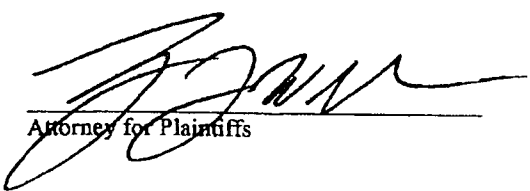
I certify that on September 10, 2009, I caused
to be: ☐ mailed

☒ hand delivered

☐ faxed

☐ e-mailed

a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Plaintiffs

ROSEN, ROSEN & HAGOOD, LLC

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Timothy J.W. Muller
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(843) 266-8129

September 10, 2009

HAND DELIVERED

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

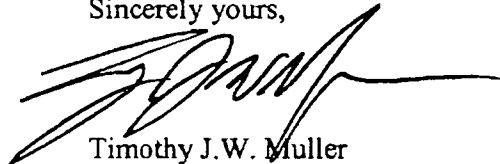
Re: Livingston v. Danube Valley Exports, LLC, et al.
Case No.: 09-CP-10-3608

Dear Julie:

Enclosed please find Plaintiff's Memorandum of Law in Support of Motion for Rule to Vacate or Show Cause and Write of Ejectment against Defendant Danube Valley Exports, LLC., in the above referenced case. I would appreciate your filing the original and returning a clocked-in copy to me with my courier. By copy of this letter, I have also forwarded this to Judge Herrington and Defendant's counsel.

With kind regards, I am

Sincerely yours,



Timothy J.W. Muller

TJM/dlc
Enclosures

cc: Judge Kristi Herrington (via hand delivery)
Eben Cockley, Esquire (via hand delivery)
Danube Valley Exports, LLC. (w/enc.)

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2009-CP-10-3608

ELIZABETH LIVINGSTON,)
)
 PLAINTIFF,)
)
VS.)
)
DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH and)
WILLIAM SMITH,)
)
 DEFENDANTS.)

MOTIONS HEARING

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on September 9th and 11th, 2009

SUSAN "MIA" PERRON, CCR, CVR-CM
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

APPEARANCES OF COUNSEL

FOR THE PLAINTIFF: Timothy J. W. Muller, Esquire
Rosen, Rosen & Hagood
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Charleston, South Carolina 29402

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Attorney at Law
56 Broad Street
Charleston, South Carolina 29401

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EXHIBITS

[None]

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SEPTEMBER 9, 2009

COMMENCING AT 10:26 A.M.

- - - - -

THE COURT: Counsel, if you will please state
your name for the record, and the party you represent.

MR. MULLER: Your Honor, my name is Tim Muller.
I represent Elizabeth Livingston, the plaintiff, and --

MR. COCKLEY: My name is Evan Cockley. I
represent the defendants, Danube Valley Exports, Vicki
and William Smith.

THE COURT: Mr. Muller, we are here on your
motion for a rule to vacate or show cause?

MR. MULLER: Correct.

THE COURT: All right. Counsel, I'll be happy
to hear from you.

MR. MULLER: Thank you.

Basically, we are -- we're filing a motion for a
rule to vacate or show cause and a writ of ejectment
for tenants.

My client is an owner of a smaller commercial
building on King Street. The tenants and my clients
entered into a lease agreement on September 17th of
last year, and essentially they have fallen behind in

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1 the rent starting in April.

2 Prior to that my client agreed after
3 communication with the tenant to three months of a
4 reduced rate, half the rental amount, and despite that,
5 the tenants fell behind in that rent.

6 She sent a certified letter to them on May 1st
7 requesting all of the past-due rent, which was in the
8 amount of over \$4,000. They continued to fall behind
9 and at which point she filed a writ or an ejectment in
10 magistrate's court on May 15th, and a rule to vacate or
11 show cause, at which point the defendants transferred
12 them to this court alleging that there were damages of
13 over \$7500. The only reason stated is that business is
14 bad and that the City of Charleston is doing a street-
15 scape project on lower King Street, which they knew
16 about before entering the lease agreement.

17 So, essentially, it's their position that they
18 should not have to pay rent or that they should somehow
19 have the Court issue a reduced rent just because of the
20 City's project that's ongoing.

21 At any rate, they had requested a jury trial.
22 And, unfortunately for my client, this is kind of
23 lingering in court. My client really only wants them
24 ejected and out of the building. At this point it's
25 almost \$18,000 in back rent. They are obligated to pay

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1 reasonable attorney's fees and costs. It's our
2 position that there are no triable issues for a jury.
3 There's no frustration of purpose of the lease
4 agreement. I think this is just a simple matter of
5 them settling this in court.

6 So I guess the relief that we are seeking today
7 is for a -- as indicated in our motion is a writ of
8 ejectment and a rule to vacate or show cause, or,
9 in the alternative, at least based upon the code
10 statutes --

11 I direct the Court's attention to section
12 27-37-150, which provides specific provisions that
13 the tenant should have to pay rent during this process
14 while this is ongoing in court and is responsible for
15 the rent, full rent, during the proceedings, at which
16 point they -- and, of course, they have paid nothing
17 since May 1st.

18 So it's our position that we would like a writ
19 of ejectment or, at the very minimum, the payment of
20 rent to the -- to my client during this time. Thank
21 you.

22 THE COURT: Thank you.

23 MR. COCKLEY: Please excuse me. I just got in
24 this case, yesterday. All right? But I'm fairly
25 familiar with the issues. Number one: the pro se

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1 answer prepared by Mr. and Mrs. Smith demands a jury
2 trial. And I think under section 27-37-155(b)(1)
3 they're entitled to a jury trial on the issue of the
4 lease, the payments, et cetera.

5 What has happened here, very briefly, Your Honor
6 -- and I haven't had time to prepare any affidavits.
7 This being a rule hearing, I imagine I could put my
8 client on the stand and he can testify to this. I also
9 think that the defendant -- or the plaintiff's attorney
10 will agree with most of it; and that is, they
11 negotiated this lease back in September of last year,
12 at which time there was a planned city street-scaping.
13 Okay. And there was about a two-month period of free
14 rent which up that.

15 But one of the most important and essential
16 features of the lease was when was the street-scape
17 going to end. And the realtors and representatives of
18 the plaintiff came to Mr. and Mrs. Smith and their real
19 estate agent and said the street-scape will end in
20 January. And they had a moratorium in place from
21 November 20 through I think about January 5 in which
22 they conducted the business -- moved in, conducted the
23 business and were very successful.

24 Well, then after January 5 of this year the
25 landscape around there kind of started to look like a

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1 rock and a rod. I mean, it just really got torn up.
2 The whole street was devastated. They had these little
3 catwalks that you had to walk in. And the street
4 traffic down there just absolutely disappeared. Nobody
5 did any business at all. All right? And the plaintiff
6 has agreed -- you know, agreed halfway through, you
7 know, I'll abate the rent.

8 And we have rights of quiet enjoyment that need
9 to be litigated in the lease, and clearly they've not
10 had the quiet enjoyment of this property. There's
11 street scaping still going on today. All right? And
12 these are issues that are triable in front of the
13 jurors. And that's all we're asking, that we be
14 granted our right to a jury trial.

15 MR. MULLER: In the -- in the lease agreement,
16 section (9)(c) -- or, excuse me -- section 21, clause
17 21, addresses quiet enjoyment; and that is from
18 interference from the landlord or someone who claims to
19 be in rightful lawful possession.

20 This is the City of Charleston operating a
21 street project that was well-known when they entered
22 the lease agreement. And I don't understand how that
23 would affect this contract for rent or their position
24 that they should not have to pay rent. Thank you, Your
25 Honor.

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1 MR. COCKLEY: In response, the realtor for the
2 plaintiff, all right, told the defendants and their
3 realtor that the street-scape project would end in
4 January of 2009. It was a substantial
5 misrepresentation. That project is still going on
6 today. And that is referenced in their counterclaim
7 against the plaintiffs. I would like to clean it up a
8 little bit. If the case survives beyond today, I
9 certainly would like to clean up the answer and
10 counterclaim.

11 THE COURT: Mr. Cockley, so your client did not
12 have to pay rent during this time?

13 MR. COCKLEY: There needs to be some discussion.
14 And obviously the property has some rental -- there is
15 some rent due, but we don't know how much to pay.
16 They're suggesting that half the rent is the proper
17 amount to pay. All right? I'm not an economist, but
18 based upon gross sales and reduction in gross sales,
19 it's a figure somewhere there. Yeah, some rent needs
20 to be paid in the interim.

21 I believe that the code has provisions in it
22 that allows for the Court to intervene and suggest a
23 fair rental rate until the issue can be resolved.

24 THE COURT: All right. Mr. Cockley, you
25 indicated to the Court there was some moratorium issued
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1 that your client did not have to pay rent.

2 MR. COCKLEY: There was a two month up-fitting
3 period in the lease.

4 MR. MULLER: Yes, Your Honor. The first --

5 THE COURT: Hold on.

6 Mr. Cockley, do you need additional time to
7 prepare this case?

8 MR. COCKLEY: I would like some additional time
9 to prepare it, yeah.

10 THE COURT: All right. I'll pass this case
11 until Friday afternoon.

12 [Whereupon, the Court and the clerk of court
13 confer]

14 THE COURT: I'll pass this case until noon on
15 Friday. That should give you some additional time, Mr.
16 Cockley. Please, when you come back, have some more
17 information regarding the moratorium that you issued --
18 or indicated.

19 MR. COCKLEY: All right. In other words, you're
20 continuing the hearing until Friday. We're not going
21 to pull a jury and try this?

22 THE COURT: No, sir. We're in a non-jury week.
23 We're only here on plaintiff's motion for a rule to
24 vacate or show cause and a writ of ejectment.

25 MR. COCKLEY: In response to that, they filed an

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1 answer and counterclaim with a requested jury trial.

2 THE COURT: Who is they?

3 MR. COCKLEY: Mr. and Mrs. Smith. They did it
4 pro se July 22nd of this year. I have a copy.

5 THE COURT: Well, the motion that we are here on
6 today was filed July 15th.

7 MR. COCKLEY: Okay. But I believe they filed --
8 Didn't you file an amended complaint seeking --

9 THE COURT: Mr. Cockley, if you will please
10 direct your questions to the Court.

11 MR. COCKLEY: Yeah. I believe that an amended
12 complaint -- all right -- and I don't have all the
13 pleadings yet. All right? I believe an amended
14 complaint was filed, as well, seeking ejectment and
15 to that complaint they have interposed a counterclaim
16 with a jury trial request. And the code very
17 specifically -- section 27-37-155(b)(1) allows for a
18 trial by jury, and they've just simply requested a
19 right that's provided for in the code.

20 THE COURT: Mr. Cockley, that is not the issue.
21 Whether or not your client has requested a jury trial
22 does not negate the fact that he may or may not owe
23 rent. Is that what you're telling the Court?

24 MR. COCKLEY: No. What I'm saying is we're not
25 sure of the amount of rent that is owed in which to

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1 pay, because obviously the value of the property,
2 through fault or no fault of theirs, law of contracts,
3 similar to a forced majeure situation where you've got
4 circumstances that arose outside the control of either
5 of the parties that basically frustrated the intent of
6 the contract. You can't sell anything down there right
7 now. It's very, very difficult. Most of the
8 businesses are shuttered and they're having problems.

9 THE COURT: All right. Mr. Cockley, I'm going
10 to pass this until Friday at 12:00 to allow you to
11 prepare for the motion that we are -- that is scheduled
12 for this week.

13 MR. COCKLEY: Okay. I understand.

14 THE COURT: Thank you.

15 MR. MULLER: Your Honor, will I have to present
16 witnesses for this Friday? I mean, on his issues?

17 THE COURT: The only thing set before me this
18 week --

19 MR. MULLER: Right.

20 THE COURT: -- is your motion, counsel.

21 MR. MULLER: Okay.

22 THE COURT: Thank you.

23 MR. MULLER: Thank you.

24 MR. COCKLEY: Thank you, Your Honor.

25 [MOTION HEARING ADJOURNS AT 10:40 A.M.]

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SEPTEMBER 11, 2009

COMMENCING AT 3:30 P.M.

MR. MULLER: Good afternoon, Your Honor. My name is Tim Muller and I represent Elizabeth Livingston, plaintiff in this matter. The defendants are Danube Valley Exports, and they are the tenants in a building that my client owns, on lower King Street in the City of Charleston, a small commercial building.

We are here this afternoon requesting a rule to vacate or show cause and writ of ejectment for Defendant Danube Valley for their refusal and failure to pay rent for nearly six months.

This is a commercial eviction and controlled by South Carolina code section 27-37-10 through 160. We have filed a memorandum of law in support of our motion and I guess I will go through a brief time line. I'm sorry if these facts are old, because I know you've heard them before.

On September 17, 2008, Danube Valley and Elizabeth Livingston entered into a lease agreement whereby \$3,148.95 was the rent agreed upon due each month on the first day of each calendar -- each day of the calendar month. Included in that is a late-fee

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1 clause which provides fifty percent late fee per month
2 if the rent is received after the 5th calendar day each
3 month.

4 Paragraph 19 provides that Danube will pay costs
5 of legal proceedings, including reasonable attorney
6 fees should my client need to proceed legally to
7 enforce Danube's lease obligations, including failure
8 to pay rent.

9 And the first two months they were -- they moved
10 in in the latter part of September, 2008. They were
11 given two free months rent and a couple of weeks in
12 lieu of any tenant offset and in consideration of a
13 street project that was ongoing on lower King Street
14 operated by the City of Charleston and its employees or
15 subcontractors.

16 At any rate, they paid rent for December,
17 January, and February. In about -- in late February,
18 Vicki Smith, a principal of Danube, contacted my client
19 expressing concerns with her retail business and its
20 profitability. In good faith and consideration, my
21 client and Danube signed an addendum to our agreement
22 reducing the rent to half of that amount for the months
23 of March, April and May only. Danube did pay rent for
24 March, and thereafter failed to pay rent.

25 On May 1st my client sent a certified letter

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1 stating they owed the month of April and May rent, and
2 a late fee for April, in the amount of \$4,082. This
3 was received and Vicki Smith responded with a letter
4 stating that they would be unable to get current with
5 rent. She did submit \$1,000, which was deducted from
6 the 4,082, but thereafter failed to pay anything to my
7 client.

8 On May 15th, and within her rights, she applied
9 for eviction and a rule to show cause in magistrate's
10 court. Prior to the issuance of a rule to vacate or
11 show cause and the normal ejectment proceedings
12 pursuant to these statutes, they filed a answer and
13 counterclaim alleging \$7500 -- over \$7500 in damages,
14 based on economic loss, primarily because of the City
15 of Charleston's street-scape project of lower King
16 Street and that in some way my client should be
17 responsible for their economic loss and thereby they
18 should pay a reduced rent or no rent at all until the
19 economy gets better.

20 Consequently, what happened is this got delayed,
21 tied up in court. My client had to file legal
22 pleadings in response to their complaint, and here we
23 are. And I have filed a motion to vacate or show
24 cause, as they are remaining in the premises and have
25 not paid rent in nearly six months.

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1 At this point they owe it's my estimate of
2 \$17,852.75 in back rent. And also they owe the cost of
3 these proceedings and including reasonable attorney's
4 fees for their breech.

5 So we are requesting here today fiducements
6 [phonetic] of a rule to vacate or show cause pursuant
7 to the statutes mentioned and an issue of writ of
8 ejectment and within ten days. I think we have agreed
9 -- didn't we agree to fourteen days? I can't remember.
10 That would be fine. But for failing to pay rent.

11 And also we're requesting, pursuant to these
12 statutes, sections 150, specifically. Section 27-37-
13 150 provides that the accrual of rent after institution
14 of proceedings, after commencement of ejectment
15 proceedings by the issuance of the rule to vacate or
16 show cause -- of occupancy of the premises involved
17 shall continue to accrue as long as the tenant remains
18 in possession.

19 Section 155, which is specifically where there
20 are commercial lease contract claims and counterclaims
21 where the tenant raises counterclaims, the tenant is
22 required to pay the landlord all rent which comes due
23 after the issuance of a written rule, and also that the
24 tenant is required to pay landlord all rent allegedly
25 owed prior to the issuance of the rule provided;

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1 however, that in lieu of payment the tenant be allowed
2 to submit to the Court a receipt and cancelled check or
3 both maintaining that payment has been made to
4 landlord.

5 So, furthermore, this is -- this is the -- we
6 are requesting specifically a rule to vacate or show
7 cause, writ of ejectment, past rent, and the costs of
8 bringing these legal proceedings, and reasonable
9 attorney fees. Thank you, Your Honor.

10 THE COURT: Mr. Muller --

11 MR. MULLER: Yes.

12 THE COURT: -- how does the effect of the
13 request for the jury trial affect my ability to issue
14 an order of ejectment at this time?

15 MR. MULLER: I don't believe that the -- the
16 issuance of a jury trial I believe -- they are of
17 course entitled to a jury trial provided in section
18 5(b)1), and that's that a jury trial is requested upon
19 which --

20 And here in our case -- on a magistrate level,
21 can be heard the next term of court. Further down,
22 section 5 provides that the Court orders that the
23 tenant pay all rent due and accruing as of -- and
24 during the pendency of the action as provided by
25 section 150, which I have already addressed. And this

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1 section, the Court may require the payments to be made
2 directly to the commercial landlord or to the clerk of
3 court to be held until final disposition of the case.

4 It's our understanding that they wish to proceed
5 with an action against my client and/or the real estate
6 agent, and we believe that this back rent should be
7 either paid to the landlord or to this Court as
8 security in the -- while these claims go forward.

9 Does that answer your question, or no?

10 THE COURT: My question is whether or not you
11 feel that the statutes provide for a jury trial on the
12 writ of ejectment.

13 MR. MULLER: I believe that -- I mean, I believe
14 that -- specifically on writ of ejectment I think it
15 could but I think that necessitates, based on these
16 statutes, that they pay -- continue to pay rent if
17 they're -- I mean, if they're not going to be -- if
18 they're not going to vacate the premises.

19 THE COURT: All right. Thank you.

20 MR. MULLER: Does that clarify it --

21 THE COURT: I just -- counsel, it's clear to me.
22 I just want to make sure that you articulated your
23 position to me.

24 MR. MULLER: Okay.

25 THE COURT: All right. Thank you --

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1 THE COURT: Counsel?

2 MR. COCKLEY: Yeah.

3 Your Honor, I mean, we have -- put it this way.
4 We've had discussions. We've met in counsel -- or in
5 chambers. There are certain stipulations.

6 We again -- I would point out that we have
7 requested a jury trial on the issue of the ejectment
8 and also on the financial issues that accompany this
9 case. Number one, the amount of rent owing; and,
10 number two, also for a claim we have against the
11 landlord we feel for negligent misrepresentations. All
12 right? And would request a jury trial on those issues.

13 Should the Court disregard our request for a
14 jury trial on the issue of ejectment and for, you know,
15 the payment of any funds due under section 27-37-
16 155(a)(1), I think, and (2), should -- should that be
17 ordered without our request for a jury trial, we would
18 object to that or want our objection noted for the
19 record.

20 Regarding the amount of rents paid or monies
21 paid to the landlord, I don't dispute Mr. Muller's
22 accounting but for two instances. There was a 1,000-
23 dollar payment made in April of '09, and there's also a
24 3,148-dollar and ninety-five cent deposit that was paid
25 along with the rent -- or along with the lease. All

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1 right?

2 And as discussed, we do stipulate that there has
3 been no rent paid for approximately the last three and
4 a half, four months.

5 We would request -- and, again, I may be
6 redundant. All right? This is a rather unusual
7 situation. That should this Court go ahead and move
8 and eject my clients, that we would request fourteen
9 days in which to remove all items from the leasehold.

10 I think that's about it.

11 THE COURT: Counsel, do you agree that if I do
12 not rule on the rule to show cause and the writ of
13 ejectment, that your client still owes rent while he is
14 maintaining the premises?

15 MR. COCKLEY: I agree that if my client remains
16 in the premises that there has to be a reasonable
17 rental rate determined that he has to pay. Okay? And
18 I agree, and we can stipulate, that, no, the rent due
19 under the lease agreement is not current. That's not
20 an issue. Okay? But we are also alleging in our
21 counterclaim, all right, that the plaintiff didn't
22 perform what they said they would perform in the
23 contract and we are seeking money judgment -- a money
24 judgment against them. All right? We're seeking
25 damages.

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1 THE COURT: And, counsel, is your client
2 prepared to vacate the premises within fourteen days --

3 MR. COCKLEY: Yes, they are.

4 THE COURT: -- as you indicated to the Court?

5 MR. COCKLEY: Yes. They will do that. Yes.
6 They can vacate the premises within fourteen days, yes.

7 THE COURT: And so are you withdrawing your
8 request for a jury trial as to the writ of ejectment at
9 this time?

10 MR. COCKLEY: Put it this way: I don't know
11 whether I want to withdraw any of my rights at any
12 time. I want to keep that option open. No. For
13 ejectment, no. No. I -- we will move out in fourteen
14 days. That's not an issue.

15 THE COURT: All right. So at this time,
16 counsel, you are withdrawing your request for a jury
17 trial as to the writ of ejectment only?

18 MR. COCKLEY: Right. But as far as all
19 financial issues, we would pursue a jury -- we would
20 like the Court to pursue a jury trial. That includes
21 the payment of any monies under section 27-37-155(a)(1)
22 and (2), I believe.

23 I think those are your statutes; correct?

24 MR. MULLER: 155.

25 MR. COCKLEY: Okay. We don't think that -- we

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1 don't agree with the interpretation, but we understand
2 that we don't -- we don't agree with the assertion and
3 the interpretation of the code that the plaintiff has
4 put forward.

5 THE COURT: Mr. Muller, based upon the
6 withdrawal now of the request for a jury trial only
7 as to the request for the jury trial on the writ of
8 ejectment, does that change counsel's position at all
9 as to the request for relief requested of this Court?

10 MR. MULLER: I think through the issuance of a
11 rule to vacate or show cause, this Court is still
12 allowed, as security, to enforce that the defendants
13 pay the back rent. Obviously, if they're going out in
14 fourteen days they won't have any accruing rent going
15 forward.

16 But based on the -- their conduct so far, the
17 concern of my client is that -- this will be delayed
18 indefinitely and we'll recover nothing or little.

19 That is why we are requesting that this Court,
20 as security -- and if it goes to the Court rather than
21 my client, that's fine -- but to have that security of
22 the rent that is clearly already owed by the lease
23 agreement itself.

24 I mean, it's clear I don't -- can't just make
25 some arbitrary number up when rent is due. Rent was

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1 agreed by the parties. And it's our position that
2 there was no breach by my client, so I think it's
3 fairly clear what the back rent amount is.

4 THE COURT: Counsel?

5 MR. COCKLEY: We've alleged -- or my clients
6 have alleged in this answer and counterclaim breach of
7 the lease by the plaintiff. And this is not a summary
8 -- a motion for summary judgment. We think there's a
9 very legitimate dispute as to whether the plaintiff
10 performed under the terms of the lease agreement. And
11 under those circumstances, we don't think that it is
12 warranted that this Court make a determination that my
13 client pay any monies into the clerk of court as
14 security for a judgment that plaintiff has not been
15 awarded. And we feel that there is some speculation in
16 that request, and he has not obtained -- and there is
17 no judgment against anybody at this point in this
18 trial. There is no concrete evidence that anybody is
19 owed any money right now, outside of the lease
20 agreement, and we have -- as I mentioned -- as I have
21 stated earlier, we have claims that the lease was
22 not -- that the plaintiff did not perform on the lease
23 and/or circumstances existed that made the lease
24 unperformable, rendered performance under the lease
25 incapable, and that being the street-scape.

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1 THE COURT: Your position on that, Mr. Muller?

2 MR. MULLER: Your Honor, in order for a contract
3 to be rendered suppose -- by force majora or -- excuse
4 me. I'm drawing a blank. Frustration. One of the
5 requirements is that it's an unforeseeable event. This
6 street-scape project was already happening.

7 It's our position also that there is no
8 negligent misrepresentation claim because this was
9 relayed from the City. And on top of that, this was a
10 future event. If there was any claim here, there's --
11 it's nonexistence as to the negligent
12 misrepresentation.

13 If they -- I think that their cause of action
14 can go forward, as our breech of contract they're --
15 the lease agreement itself is for a five-year lease.
16 We anticipate going forward on that breech of contract
17 and if they go forward with a negligent
18 misrepresentation claim. But those are separate issues
19 than vacating the premises under this rule to show
20 cause and the issuance of back rent. And pursuant to
21 section 27-37-140, there is a provision or an action of
22 a tenant wrongfully dispossessed. In case any tenant
23 is wrongfully dispossessed, he may have an action for
24 damages against the landlord. That clearly can be
25 addressed at a later time in the future.

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1 THE COURT: All right. Counsel, I will allow
2 you final argument on this matter.

3 MR. COCKLEY: Your Honor, when Mr. Muller
4 asserts that the contract was performed, you know,
5 we -- you know, we've made the Court aware that there
6 were representations by the agent of the plaintiff to
7 the defendant which induced him to enter into the
8 contract. I have a letter here from his real estate
9 representative attesting to such.

10 You know, anybody who -- the fundamental rule of
11 contracts is that if you've got fraud in the inducement
12 of an agreement, all right, that draws a party into
13 signing a contract based upon false representation,
14 that contract is void. Void and/or voidable. All
15 right? Which is what the plaintiffs have alleged -- or
16 the defendant has alleged in their counterclaim.

17 We don't see the need for the payments of any
18 monies into the clerk of court as security for any
19 judgment that plaintiff may get in this action, just as
20 we're not moving that they pay into the clerk of
21 court's office for any judgment that we might get.

22 THE COURT: All right. Anything -- any
23 additional argument? Have you fully articulated your
24 position on the record?

25 MR. COCKLEY: One last thing I would point out
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1 in the rule, which we are -- and this is the rule here.
2 The only request by plaintiff is that the defendant
3 vacate the premises. There is no request for any
4 monetary relief whatsoever.

5 MR. MULLER: Your Honor, can I address that?

6 THE COURT: You may.

7 MR. MULLER: We also requested a rule to vacate
8 or show cause pursuant to these precise statutes. And
9 that's one of those statutes --

10 THE COURT: All right. Counsel, the order of
11 the Court -- my reading of the statute as cited,
12 particularly 27-37-155, that the tenant should be
13 required -- when a counterclaim is filed you certainly
14 are entitled to a jury trial. You have waived --
15 plaintiff -- excuse me.

16 The request for a jury trial has been waived
17 with respect only to the issue of the writ of
18 ejectment. I am -- we will issue the order. It will
19 become effective Monday. The tenants need to vacate
20 within ten days from the issuance of the order.

21 It is further ordered that all rent due and
22 accruing as of the pendency of this action, pursuant to
23 the statute. My reading of 27-37-155(a)(2), that the
24 tenant is required to pay the landlord all rent
25 allegedly owed prior to the issuance of this rule.

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1 As such, the amount indicated by the plaintiff
2 that the defendants owe is \$17,852.75 in rent and late
3 fees as of today's date, September 11th, 2009.

4 Pursuant to subsection 5 -- (b)(5) of the same
5 statute, I am ordering within thirty days of the
6 issuance of the order, the filing of the order, which
7 will be Monday due to the lateness of the hour of this
8 hearing, that the payments be made to the Clerk of
9 Court of Charleston County.

10 As to the remaining requests, the claims and to
11 the request for the jury trial, this case will be
12 placed on the jury docket.

13 Counsel, you have requested that it be tried not
14 before 120 days. I will make that notation in the Form
15 4 for you and, as such, you will need to get a
16 scheduling order from the chief admin, which is Judge
17 Jefferson if that cannot be complied with according to
18 the docketing schedule.

19 Is there anything further, counsel?

20 MR. COCKLEY: No.

21 MR. MULLER: No, Your Honor. Thank you.

22 THE COURT: Thank you.

23 Mr. Muller, if you will do the -- prepare the
24 order.

25 MR. MULLER: Okay.

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1 THE COURT: Thank you.

2 MR. MULLER: I have a prepared order but I'm not
3 sure if it's --

4 THE COURT: If you will prepare the order and --
5 because the order will not be issued until the earliest
6 would be Monday. I will be back on the bench here in
7 Charleston on Monday. So if you will make sure that
8 opposing counsel has had time to review the order and
9 it is all -- understanding your objection to my ruling,
10 I'm sure. But with his understanding and review. And
11 then you may submit that via e-mail, if that's
12 acceptable. Or, as I said, I will be here on the bench
13 Monday morning.

14 Any further assistance required of the Court?

15 MR. MULLER: Thank you, Your Honor.

16 MR. COCKLEY: No.

17 THE COURT: Thank you. Thank you, gentlemen.

18 [MOTIONS HEARING CONCLUDES AT 3:52 P.M.]

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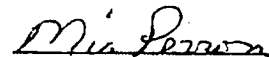
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the motions hearing held before the Honorable Kristi L. Harrington, on September 9th and September 11th, 2009.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 10th day of September, 2010.


Mia Perron, CCR, CVR-CM
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CCR, CVR-CM

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT AND RULE TO
SHOW CAUSE AGAINST
DEFENDANTS**

FILED
2010 JAN 22 PM 8:47
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Elizabeth Livingston submits the following memorandum of law in support of her motion for summary judgment and rule to show cause against Defendants. For the reasons set forth below, this Court should grant Plaintiff's motion.

BACKGROUND

Plaintiff Elizabeth Livingston ("Livingston") is the owner of a small historic building located at 163 King St. Charleston, South Carolina. Livingston and Defendant Danube Valley Exports, LLC ("Danube") entered into a lease agreement for the building (the "premises") on September 17, 2008, whereby Danube would occupy the space as tenant. Defendants Vicki W. Smith and William Smith signed personal guaranties to the lease agreement in the event Livingston could not recover rent or damages from Danube. Danube agreed to lease the premises for a period of five (5) years commencing on October 1, 2008. The expiration of the lease term is September 30, 2013.

In the lease agreement, the parties agreed that Danube would pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each

year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. The lease agreement further provides that Danube will incur a 15% late fee per month for any rent not received by the fifth (5th) day of each month. In the event of default by Danube, the lease agreement provides that Danube is responsible for all costs incurred by Livingston in bringing legal proceedings to enforce Danube's obligations, including reasonable attorney's fees. Danube was given the first two months free rent in lieu of any tenant up fit by Livingston, with Danube's first rent being due on December 1, 2008.

Danube paid rent for December 2008, January 2009, and February 2009. On February 27, 2009, after Defendants communicated concerns to Livingston about the poor state of their retail business, Livingston and Danube signed an addendum agreeing that Danube would pay one-half of its normal rent, in the amount of \$1,898.95, for the months of March, April, and May, 2009 only. Danube paid the one-half rent for March and failed to pay rent due for April. On or about April 22, 2009, after repeated attempts by Livingston to reach Defendants regarding past due rent, Defendant Vicki W. Smith contacted Livingston to inform her they would be unable to pay rent for April. On May 1, 2009, Livingston sent Defendants a certified letter requesting rent payment for April and May and the late fee pursuant to the lease agreement, in the amount of \$4,082.74. Danube submitted a check for \$1,000 to Livingston on May 4, 2009, and has since refused to make further payment.

On May 15, 2009, Livingston applied to eject Danube and for a rule to vacate or show cause in Charleston County Magistrate's Court for its breach of the lease agreement. On May 29, 2009, Danube submitted an answer and counterclaim to Livingston's eviction application, alleging it had damages in excess of \$7,500 and that this court had jurisdiction over the matter.

In support of its damage allegation, Danube argued that the City of Charleston's street beautification project of lower King Street (hereinafter "streetscape project") and the poor economy had caused their business economic harm. This streetscape project is believed to have been wholly operated by the City of Charleston and its employees or contractors, and Livingston has no control or influence over this project. Furthermore, the streetscape project had commenced prior to the parties entering into the lease agreement and was thereby a foreseeable event to both parties.

On June 25, 2009, Livingston submitted an amended summons and complaint, asserting causes of action for breach of contract and ejectment of tenants. On July 21, 2009, Defendants submitted another answer and counterclaim, making nearly identical allegations as their earlier answer, but further demanding a jury trial. Defendants again argued that they were entitled to a reduction in rent or should not have to pay rent at all because of their low retail profitability and the City of Charleston's streetscape project. Ironically, Danube failed to pay rent for two of the three months that rent was reduced, as reflected in the lease agreement addendum.

On July 15, 2009, Livingston filed a motion to vacate or show cause and writ of ejectment and supporting memorandum of law against Danube in order to evict Danube for its refusal to pay rent and to recover mounting past due and accruing rent. After hearing oral arguments, Judge Harrington issued an order on September 14, 2009. This order required Danube to vacate the leased premises within ten (10) days from the issuance of the order and required Danube to pay to this Court \$17,852.75 in unpaid rent within forty (40) days, pursuant to S.C. Code Ann. § 27-37-155, during the pendency of the action.

At the expiration of forty days, Defendants had vacated the premises but failed or refused to pay the unpaid rent to this Court, as required by Judge Harrington's order. In response,

Livingston filed a rule to show cause and verified petition asking this Court to hold Defendants in contempt of this Court's previous order, striking Defendants' answer and counterclaim, requiring Defendants to comply to this Court's previous order, and requiring Defendants to pay costs and attorney fees, pursuant to their lease agreement, for the costs associated with filing the rule to cause and petition because of Defendants' failure or refusal to comply with this Court's order. According to the Charleston County Clerk of Court, this rule to show cause is being addressed concurrently with this motion for summary judgment.

On October 12, 2009, Livingston filed this motion for summary judgment against all Defendants in this matter. In support of her motion, Livingston submitted affidavits of Kit Regnery, Livingston's real estate leasing agent, and Timothy J.W. Muller, Esq., one of her attorneys in this matter. Based on these affidavits, the pleadings, the lease agreement and personal guaranties, oral arguments as the court will allow, and any other evidence relevant to this matter, Livingston asserts that there is no genuine issue of material fact for a jury to decide in this case and that Livingston is entitled to judgment as a matter of law.

LEGAL STANDARD

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

In particular, the trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Baughman v. AT&T Co., 306 S.C. 101, 410 S.E.2d 537 (1991). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. Celotex, 477 U.S. at 317. In such a situation, there can be "no genuine issue as to any material fact" since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Id. at 322-23.

LEGAL ANALYSIS

The party seeking summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Where there is conflicting evidence, of course, the Court must take the evidence in a light most favorable to the non-moving party. Kun v. Berkeley County Government, 214 F. Supp. 2d 559 (D.S.C. 2001). However, a non-moving party may not simply identify the existence of a question of fact; she must come forward with competing evidence and show that there is a legitimate question regarding its resolution. See Benton v. Ozmint, 2004 WL 3249249 (D.S.C. Oct. 27, 2004). Likewise, when a motion for summary judgment is made and supported, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue

for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” Rule 56(e), SCRPC (2009).

A. Breach of Contract

Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by a consideration of the plain and unambiguous language of the contract, the question as one of law may be resolved by the court. Lyles v. BMI, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987); citing First-Citizens Bank & Trust Co. v. Conway Nat’l Bank, 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984). By failing to pay rent when due, Defendant Danube breached its lease agreement with Livingston. The language of the lease agreement is unambiguous and incapable of more than one construction: Danube was contractually obligated, for a period of five (5) years, to pay Livingston in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. In addition, “[a]ll rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance; occurring from the first day of every month for which rental is due but unpaid.” Paragraph 4, Lease Agreement (Sept. 17, 2008) (attached as Exhibit A to Plaintiff’s Motion for Summary Judgment). While this rent amount was reduced in half, by addendum, for the months of March, April, and May of 2009 only, Danube stopped paying rent in April and elected to remain in the premises without paying rent. Danube’s failure to pay rent when due, failure to cure its default, and subsequent refusal to vacate the premises after it ceased paying rent undoubtedly amount to a breach of the lease agreement.

Upon Danube's failure to pay rent when due and failure to cure such default of the lease agreement, paragraph 19 addresses "Default and Remedies." According to paragraph 19 of the lease agreement,

If Landlord should elect to reenter as herein provided, or should it take possession pursuant to legal proceedings, it may either terminate this Lease or it may from time to time without terminating this Lease, relet the Premises for such term and at such rentals and upon such other terms and conditions as the Landlord may deem advisable. If such reletting shall yield rentals insufficient for any month to pay the rental due by Tenant hereunder for that month, Tenant shall be liable to Landlord for the deficiency and same shall be paid monthly. No such reentry or taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease unless written notice of such intention given by the Landlord to the Tenant at the time of such reentry; but, notwithstanding any such reentry and reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. If as a result of Tenant's default hereunder, Landlord shall institute legal proceedings for the enforcement of Tenant's obligations, Tenant shall pay all costs incurred by Landlord, including reasonable attorney's fees.

Paragraph 19, Lease Agreement (Sept. 17, 2008) (attached as Exhibit A to Plaintiff's Motion for Summary Judgment). As provided in this paragraph, Livingston was forced to institute legal proceedings to reenter the premises when Danube refused to pay rent and vacate. Livingston has not, nor is she obligated to, terminate this lease agreement. According to the clear language of paragraph 19, Danube shall be liable to Livingston for any deficiency Livingston may incur in her attempt to now relet the premises for the remainder of the lease period, which expires on September 30, 2013. In addition, Danube is obligated to pay all costs incurred by Livingston in having to bring these legal proceedings, including reasonable attorney's fees. The damages recoverable to Livingston here are in accordance with South Carolina law. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996) (purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if contract had been performed).

Moreover, the obligations of Danube are binding upon Defendants Vicki W. Smith and William Smith in accordance with their signed personal guaranties to the lease agreement. As stated in the lease agreement guaranty page, Livingston permitted Danube to be named as tenant on the lease only upon the signing of personal guarantees by Defendants Vicki W. Smith and William Smith. Upon Danube's failure to pay rent, the personal guaranties binds Defendants personally thereafter for "all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance. . ." Accordingly, all Defendants are liable for Danube's breach of the lease agreement.

The plain language of the lease agreement and personal guaranties are unambiguous and their interpretation is one of law which should be resolved by this court. Defendants have breached the lease agreement and are liable for unpaid rent, late fees, the costs incurred in bringing these legal proceedings, including reasonable attorney's fees, along with any deficiency Livingston may incur in her attempt to relet the premises during the lease period which expires on September 30, 2013. Because there are no genuine issues of material fact, Livingston's motion for summary judgment for her lone breach of contract claim should be granted.

B. Defendants' Answer and Counterclaim

Defendants' answer and counterclaim likewise contain no genuine issue of material fact and Livingston's motion for summary judgment should similarly be granted on this basis. Defendants' counterclaim alleges that the terms of their lease agreement require Plaintiff "to deliver peaceful occupation" and "to provide reasonable commercial access to the property for the Defendant and her customers." *Defendants' allegation is false – there are no such terms contained in the lease agreement.* To the contrary, paragraph nine (9) of the lease agreement states:

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises, or the uses to which the leased property may be put. ***The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personality, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring thereto,*** or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

Paragraph 9, section c, Lease Agreement (Sept. 17, 2008) (emphasis added) (attached as Exhibit A to Plaintiff's Motion for Summary Judgment). Moreover, paragraph twenty-one (21) of the lease agreement, which pertains to "quiet enjoyment," merely states that Danube shall receive no interference from Livingston or anyone claiming a right of title to the property during the lease period. Livingston had no control over the City of Charleston's streetscape project and its completion or Danube's poor retail profitability. Accordingly, Defendants' allegations that Livingston broke these terms – not contained within the lease agreement – are completely without merit.

Defendants also allege that the City of Charleston's streetscape project, already in progress at the signing of the lease, and their understanding of its completion date, caused Defendants economic harm and should thereby preclude the enforcement of the lease agreement. Nowhere in Danube's lease agreement is there language pertaining to the streetscape project identified in their counterclaim. If this project was a condition of the lease in anyway, such a term or condition would have been contained therein. Defendants' vague suggestion that an oral representation as to the completion date of the City-controlled project should be considered in resolving their breach of the lease agreement is simply barred by the parol evidence rule.

“It is well established in South Carolina that parole evidence is inadmissible to vary or contradict the terms of an agreement reduced to writing.” Young v. McKelvey, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985). “[A] written agreement between two persons merges all prior talk and negotiations about the subject of the agreement. Words cannot be read into a contract which import intent wholly unexpressed when the contract was executed.” Parker v. Byrd, 309 S.C. 189, 192, 420 S.E.2d 850, 852 (1992). Moreover, “it is not proper to receive testimony to vary or contradict the terms of such agreement.” Gantt v. Van der Hoek, 251 S.C. 307, 317, 162 S.E.2d 267, 272 (1968). Because this City of Charleston streetscape project was not a term of the lease agreement, Defendants’ allegation and any proposed testimony on this issue is barred by the parole evidence rule.

Even if the parole evidence rule was not deemed to bar testimony on this issue, no claim lies for any alleged harm based on Defendants’ understanding of the streetscape project’s completion date. While Defendants failed to identify any particular cause of action in their counterclaim, no possible claim could exist under these circumstances. Paragraph eight of Defendants’ answer and counterclaim states that “[u]nknown to the Defendant, but known to the Plaintiff and/or her agents, the city’s construction project would, for an unreasonably long period of time, preclude the Defendant’s reasonable commercial use of the property, and is so precluding such use.”¹ However, in paragraph six, Defendants correctly state that at the time the parties entered into the lease “[c]onstruction on King Street improvements and renovations by the City of Charleston was then in progress.” The fact that this project was in progress at the time of the signing of the lease makes the streetscape project clearly foreseeable at the time the

¹ As stated, the lease agreement does not contain any terms obligating Livingston to provide Danube “commercial use” or “access” to the premises.

lease was signed and any understanding as to the completion of the City-controlled project was thus a future event.

Although not alleged by Defendants, no action lies here for frustration of purpose or negligent misrepresentation. The doctrine of frustration is only available where a supervening event is unforeseeable. Sanchez v. Tilley, 285 S.C. 449, 451, 330 S.E.2d 319, 320 (Ct. App. 1985). Regarding negligent misrepresentation, the rule under South Carolina law is that for a false representation to be actionable, it must relate to a present or preexisting fact that is false when made and cannot ordinarily be based on unfulfilled promises or *statements as to future events*. Private Mortg. Inv. Svcs., Inc. v. Hotel & Club Assocs., 296 F.3d 308 (4th Cir. 2002) (emphasis added); see also Sauner v. Pub. Svc. Auth. of S.C., 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003) (“Representations based on statements as to future events or unfulfilled promises are not usually actionable.”) Moreover, the negligent misrepresentation element of justified reliance only exists where the relationship of the parties is such that one party occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement. Gruber v. Santee Frozen Foods, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992).

While not identified as a cause of action, Defendants claim that Livingston or her agent knew that the City’s streetscape project would take longer than Defendants understood. The completion date of the then existing streetscape project or any understanding thereof would have been a future event at the time of the lease agreement’s signing. Furthermore, neither Livingston nor her leasing agent had a superior position of knowledge regarding the completion of the City of Charleston’s streetscape project. Defendants and their agent were just as capable of contacting the City regarding an estimated completion date. As indicated in the Affidavit of Kit Regnery, the project was subsequently delayed, in part, at the request of the retailers themselves

to take advantage of the long holiday shopping season. Because the completion date of the City's streetscape project was merely speculative, under the control of the City of Charleston, and was a future event, no action could possibly exist for negligent misrepresentation under these circumstances. As mentioned, if the streetscape project was truly an issue at the time of the signing of the lease, such a term should have been included and bargained for in the lease agreement prior to its execution and is further barred now by the parol evidence rule..

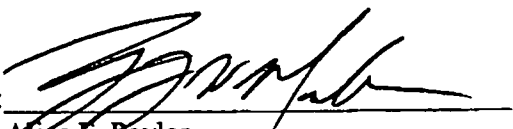
C. Rule to Show Cause

Livingston's rule to show cause and verified petition is being addressed concurrently with Livingston's motion for summary judgment. While this rule to show cause may become moot if Livingston's motion for summary judgment is granted in full, this rule to show cause was necessarily filed for Defendants' failure to deposit unpaid rent to this Court, as required by Judge Harrington's previous order dated September 14, 2009. Because Defendants have failed or refused to comply with this Court's order, Livingston asks this Court to hold Defendants in contempt of this Court's previous order, striking Defendants' answer and counterclaim, requiring Defendants to comply to this Court's previous order, and requiring Defendants to pay costs and attorney fees, pursuant to their lease agreement, for the costs associated with filing the rule to cause and petition.

CONCLUSION

Because of Danube's breach of the lease agreement is an interpretation of law and no genuine issues of material fact exist, this Court should grant Livingston's motion for summary judgment against all Defendants. Because Defendants have failed or refused to obey the previous order of this Court, the relief sought in Livingston's rule to show cause should be granted.

ROSEN, ROSEN & HAGOOD, LLC

By: 

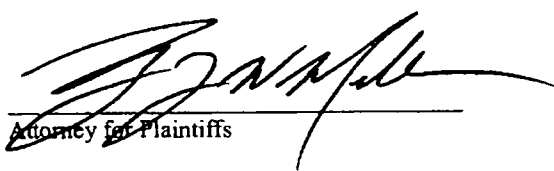
Alice E. Paylor
Timothy J.W. Muller
134 Meeting Street, Suite 200
Charleston, South Carolina 29401
Ph: (843) 577-6726
Fax: (843) 724-8036

ATTORNEYS FOR PLAINTIFFS

January 22nd, 2010
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on January 22nd, 2010, I caused
to be: ☒ mailed
☐ hand delivered
☐ faxed
☐ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELIZABETH LIVINGSTON,)

Plaintiff,)

vs.)

DANUBE VALLEY EXPORTS, LLC,)
VICKI W. SMITH, and WILLIAM SMITH,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-3608

**SUPPLEMENTAL AFFIDAVIT OF
TIMOTHY J.W. MULLER IN
SUPPORT OF ATTORNEY'S FEES**

PERSONALLY appeared before me Timothy J.W. Muller, who, being duly sworn,
deposes and states as follows:

1. I am an attorney with the law firm of Rosen, Rosen & Hagood, LLC and have
been licensed to practice law in the State of South Carolina since November of 2008.

2. I, along with my law partner, Alice F. Paylor, have served as counsel for Plaintiff
Elizabeth Livingston (hereinafter "Livingston") in the above captioned matter since my firm was
retained by Livingston in June of 2009.

3. Livingston entered into a fee agreement with Rosen, Rosen & Hagood, LLC.
Livingston is charged \$150.00-\$175.00 per hour for my time, \$300.00 per hour for Alice F.
Paylor's time, as well as hourly rates for paralegal time plus all costs incurred for the handling of
the case. We keep itemized records of our time.

4. Plaintiff Elizabeth Livingston is responsible for paying all the legal fees billed and
costs incurred by Rosen, Rosen & Hagood, LLC on this case from its inception to the present.

5. As of the close of business on Thursday, January 21, 2010, the total amount of
attorney's fees and litigation costs which have either been invoiced or will be billed by Rosen,

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JULIE ARMSTRONG
CLERK OF COURT
BY

Rosen & Hagood, LLC to Livingston in this action is \$16,153.98.

6. With the hearing of this motion for summary judgment, Livingston will continue to incur attorney's fees and litigation costs from Rosen, Rosen & Hagood, LLC in the prosecution of this action. Our estimate to prepare for and attend this hearing is an additional \$525.00, reflective of three hours of my time, bringing our estimated total to \$16,678.98

7. Any future damages hearing or otherwise will necessitate the filing of another supplemental affidavit to reflect additional costs and fees.

8. I believe the above mentioned attorneys fees and costs are recoverable by Livingston against Defendants pursuant to a lease agreement signed and entered into between Livingston and Defendant Danube Valley Exports, LLC (hereinafter "Danube") on September 17, 2008.

9. Under paragraph nineteen (19) of the lease agreement, Danube agreed that if Livingston should be forced to institute legal proceedings for the enforcement of Danube's obligations under the lease agreement, Danube shall pay all costs incurred by Plaintiff, including reasonable attorney's fees. A copy of this lease agreement is attached hereto as Exhibit A.

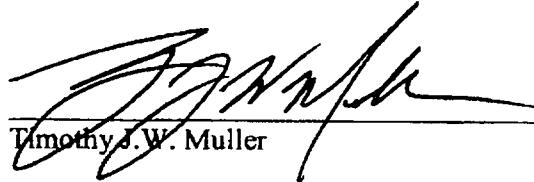
10. Defendants Vicki W. Smith and William Smith signed as guarantors to the lease agreement in the event Livingston could not recover rent and/or damages from Danube, including but not limited to reasonable attorney fees and costs incurred in bringing this action. A copy of the lease agreement personal guarantees is attached hereto as Exhibit B.

11. Livingston brought this breach of contract and ejectment action against the Defendants as a result of Danube's failure to pay rent and default of the lease agreement.

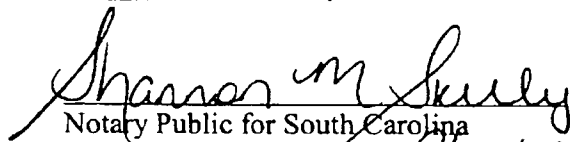
12. Consequently, I believe Livingston is entitled to the recovery of attorney's fees and costs in the prosecution of this action.

13. I am further of the opinion that the hourly fees charged by my firm for the time devoted to this case by me, Ms. Paylor, and our supporting staff is comparable to the hourly rates charged by other experienced attorneys practicing in the Charleston, South Carolina area.

FURTHER AFFIANT SAYETH NOT.


Timothy J.W. Muller

SWORN to before me this
22nd day of January, 2010.


Notary Public for South Carolina
My Commission Expires: 8/20/13



ROSEN, ROSEN & HAGOOD, LLC

ATTORNEYS AND COUNSELLORS AT LAW

134 MEETING STREET, SUITE 200

P.O. Box 893

CHARLESTON, SOUTH CAROLINA 29402

PHONE (843) 577-6726

FAX (843) 724-8036

www.rrhlawfirm.com

Timothy J.W. Muller
tmuller@rrhlawfirm.com
(843) 266-8129

January 22, 2010

HAND DELIVERED

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

Re: Livingston v. Danube Valley Exports, LLC, et al.
Case No.: 09-CP-10-3608

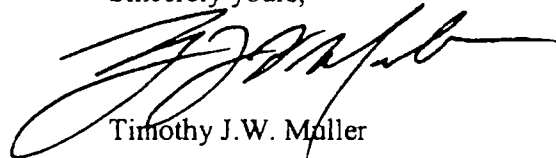
Dear Julie:

Enclosed please find Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment and Rule to Show Cause against all Defendants in the above referenced case, scheduled to be heard on Tuesday, January 26th at 3:30p.m. in Courtroom 4B. Enclosed is also my Supplemental Affidavit in Support of Attorney's Fees. I would appreciate your filing the original and returning a clocked-in copy to me with my courier.

By copy of this letter, I have also forwarded this to Judge Harrington and all Defendants.

With kind regards, I am

Sincerely yours,



Timothy J.W. Muller

TJM/dlc
Enclosures

cc: Judge Kristi Harrington (w/enc. via hand delivery)
Danube Valley Exports, LLC (w/enc. via 1st class mail)
William Smith (w/enc. via 1st class mail)
Vicki W. Smith (w/enc. via 1st class mail)

Motion for Reconsideration of the Judgment of the Honorable Kristi Harrington of January 28, 2010 with Affidavit of Vicki W. Smith dated February 23, 2010; Addendum to Lease, Letter to Elizabeth Livingston dated May 6, 2009 and Affidavit of Jeffery Yurfest of February 21, 2010 with Letter to Vicki Smith dated September 9, 2009[Without cover sheet and certifs. of service]

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Elizabeth Livingston,	)	
	)	Docket Number: 2009-CP-10-3608
Plaintiff,	)	
	)	
-vs-	)	DEFENDANTS' MOTION FOR
	)	RECONSIDERATION OF THE
	)	JUDGMENT OF THE
Danube Valley Exports, LLC,	)	HONORABLE KRISTI
Vicki W. Smith and William Smith,	)	LEA HARRINGTON
	)	DATED JANUARY 28, 2010
Defendants.	)	FILED FEBRUARY 1, 2010
	)	

Defendants, by and through undersigned Counsel, Rolf M. Baghdady, respectfully request that the Court reconsider, alter and amend the judgment under SCRCP 59(e) dated January 28, 2010 and filed February 1, 2010 by vacating the Order and dismissing the action or, in the alternative, vacating the Order and ordering a Mediation under the SC ADR Rules. The order was received by Defendants, after being served by mail, on February 13, 2010. In support of their Motion, the Defendants are concurrently filing Affidavits of Vicki W. Smith and Jeffrey Yurfest of Coldwell Banker Commercial Atlantic International.

INJUSTICE

Unbeknownst to the Court when it signed its order of January 28, 2010 is the series of financially calamitous and depressing events that allowed the Court to grant summary judgment in the sum of \$49,361.89.

The Defendants, William Smith and Vicki Smith, are natives of South Carolina. Mr. Smith is retired and now collects Social Security and is eligible for Medicare. At the time of Mr. Smith's retirement, the Smiths owned a successful travel agency in Germany.

In order for Mr. Smith to return to spend his last years with his family in South Carolina, the Smiths:

1. Arranged the sale of their "American Travel Agency" to a German;
2. The Smiths purchased a home in Charleston, SC at 232 Rutledge Avenue;
and
3. The Smiths leased the space at issue in the instant action for their antique business and travel desk.

The German to whom they sold their agency has breached the agreement and failed to account and pay over the profits due on sale. Bank of America revoked, without cause, 3 credit lines in conjunction with the economic crisis thereby causing the Smiths to be unable to pay the airlines the sums due them which ended their travel business. Also, the Plaintiff's real estate agent, Kit Regnery, misrepresented to Defendants and induced the Defendants to believe that the King Street renovation project by the City of Charleston would be completed by November 2008. However, this project was not completed on that date, thus blocking customer access to the Smith's retail store, which caused the Smiths to lose nearly all of the income and cash flow they needed to pay their rent due Plaintiff, their living expenses and mortgages. Subsequently at this time, even their Charleston home is in foreclosure. Carolina Federal Savings Bank v. William L. Smith, et. al., 2009-CP-10-8085.

The direct consequence of the series of financially calamitous events in this case was that the Defendants perceived that they were unable to retain counsel to effectively advocate their cause and instead it was largely handled *pro se*. Accordingly, the

Defendants gave up¹ and allowed the Plaintiff to offer the proposed order unopposed. This Motion argues that the Court should grant Defendants' Motion for Reconsideration and vacate the Order of Judgment to prevent injustice.

JUDGMENT BASED UPON MISREPRESENTATION

The Court's Order granting Summary Judgment is based on breach of a lease. The lease, upon which the judgment was based, was entered into by Defendants in reliance upon a misrepresentation and inducement by Plaintiff's agent to Defendants' agent. Plaintiff's agent was Kit Regenery of Batten and Moore. Defendants' agent was Jeffrey Yurfest of Coldwell Banker Commercial Atlantic International. The misrepresentation and inducement are described in The Coldwell Banker Commercial's Agent's affidavit at ¶4 as follows:

Defendants, during the negotiations with Plaintiff, expressed their concern through Vicki Smith about the street improvements at issue in the above referenced action. Thereafter, I contacted the Listing Agent who ultimately represented to me that the project would end in November 2008 and that they would offer 3 months rent while the construction was being completed.

This representation was false. The entire set of circumstances was described in a letter referenced in ¶5 of the Affidavit from Coldwell Banker Commercial's agent to Defendant Vicki Smith as follows:

Per our conversation this is my account of the construction timeline Prior to signing the lease at 163 King St., you had asked me to inquire about the end date for the streetscape construction on lower King Street as I did not know. I had asked the listing agent Kit Regnery from Batten and Moore, if he knew, as you had reservations about signing the lease during the construction project.

¹ While now declared moot in the Court's order, it is not immediately clear what the effect of Plaintiff's motion to hold Defendants in contempt of court for non-payment of rent may have had in chilling the Defendants' advocacy with the false spectre of a debtor's prison.

Kit told me that the streetscape construction would end in November 2008, prior to Thanksgiving, the peak Christmas buying period. He stated that the Landlord would offer you free rent in September, October, and November, while the construction was being completed. You said that this would be acceptable and you signed the lease.

When we spoke about this matter back in May or June 2009, you indicated that you were upset because the streetscape was still on-going and that the city was indicating the completion date was originally August 2009, but they were currently running a month behind. You asked me to find out from Batten and Moore if the information they provided you back in September was correct, and if so, where did they obtain this information. Kit stated to me that he was told by the City of Charleston that the construction would be completed in November 2008.

I hope this clears up any questions you might have about the circumstances surrounding the information I provided about the completion date of the streetscape and how I obtained that information.

Regards,
Jeff Yurfest

Accordingly, the Court's Order granting Summary Judgment in the sum of \$49,361.89 is based upon a lease that was induced by a misrepresentation and so the Court should reconsider the Motion and vacate the Order of Judgment.

**THE PROSECUTION OF THE INSTANT ACTION BY PLAINTIFF
IS A BREACH OF CONTRACT BY FAILURE TO FIRST SATISFY A
CONDITION PRECEDENT**

"Approximately ten days before the end of the three month period (May 22, 09) the Landlord (or its Agent) will meet with the tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for." (Emphasis added by underlining.) The foregoing quote is a part of the language to the Addendum to the Lease signed by Plaintiff on February 25, 2009 and Tenant Defendant February 27, 2009. Such a meeting never took place. This is a condition precedent, and it was not waived.. Quite to the contrary, the Defendants responded to the Plaintiff's demand letter offering to meet. The entire response is set out herein:

Dear Mrs. Livingston:

I am in receipt of your unsigned letter advising of the 10 days you have given me to pay the late rent at 163 King St., or be evicted. Your reputation is that of a reasonable person, so I believed after we talked 10 days ago, that we were in agreement that I would pay you what I could toward the rent until the situation improved on King Street. All of the landlords are working with their tenants to try to help them through this downturn in business and traffic. I told you in our telephone conversation that I would try to pay you something by the end of the month. I mailed you \$1,000.00 on May 1, and I tried to call your cell phone number three times that day to discuss this with you.

We have sold less than \$100.00 in the last seven days and therefore I can tell you now, that I will be unable to pay the \$4,082.74 you have requested in the next 8 days for the remainder of April and the total of the May rent. It was our hope that we would get the opportunity to benefit from Spoleto, but this probably will not matter, as we got no benefit from "Southeastern Wildlife", the "Wine and Cheese Festival", the "Antiques Show", and the "House and Garden Tours". This is not just our business that has suffered. We have spoken with all the merchants on our block and they are all experiencing the same lack of sales and traffic. You may not be aware, but the 24/7 cable news sources are continuing to report that things may have turned the corner in the economy, but unemployment and slumping sales may continue for several months to come. This has created a fear factor among the buying public and people are just not spending on anything other than essentials.

We currently have 4 vacant buildings in our block from Clifford St. to Queen St., and Kennington-Stobart Gallery is closing on May 23. If you evict us that would total 6 vacant buildings in that block. It would seem reasonable to assume that you would prefer to have the building occupied and work with us until the situation improves, rather than join the ranks of all the other vacated landlords. While speaking with the other shop owners it has come to our attention that most of the shop owners are paying a square foot rate that is half of what we agreed to in our lease. If you doubt this I would invite you come down and observe the rental rates that are posted in the windows of the vacant buildings. At the time we signed the lease we were told that we had the lowest lease on the block. We realize now how stupid we were for putting any trust in the real estate agents.

When we were negotiating the lease with your agent, we asked how long the construction would last. We were told that it would be finished in December and therefore you were willing to grant us an extra two months free rent to compensate for the construction. This was a material misrepresentation of our question as to when the construction would be completed. We later found out from other shop owners, after we had signed the lease, that construction would not be completed until August or September. With the exception of the moratorium on construction during part of November and the whole of December, we have had

construction equipment and trucks blocking our entrance daily and impeding foot traffic. For six weeks in February and March there were no sidewalks and the ramps that were put down had construction vehicles and equipment parked in front of them so close that pedestrians found it difficult to enter the ramp. The construction people would put up walkways with pylons and tape to create walking areas in the street in lieu of the sidewalks, and then they would block them by parking their vehicles in the taped off area, Yesterday, we had a huge SCE&G truck and trailer parked in front of our store and they were pulling underground wiring under the sidewalks, so the sidewalks were impassable once again. Until the traffic returns to lower King St. and the American public begins buying once again, merchants cannot pay the rents that were based on the business generated in prior years. We have had to sell off stocks and other assets to keep this business going. Banks will not loan money for any reason. Now you want to evict us when we are trying to work through this issue. If you would like to sit down and talk about this, we would be happy to meet with you. You can call me at the shop at 577-6220.

Yours very truly,
Vicki W. Smith

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises."

Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E. 2d 802 (805)

(Ct.App.2005) Accordingly, the Court's grant of Summary Judgment should be vacated and the action for damages dismissed as premature since Plaintiff failed to meet with Defendants as she agreed in the Addendum which was a condition precedent to further proceedings. While Charleston County is not yet subject to the Mandatory ADR Rules², Defendants argue that the Court should order mediation in accordance with SCADR 1(a)(3). In the alternative, the Court's grant of Summary Judgment should be vacated and an Order of Mediation in accordance with the SC Rules of ADR should be granted.

² <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-09-16-02>

PLAINTIFF FAILED TO MITIGATE DAMAGES

Instead of meeting with the Defendants as required by the Lease Addendum, the Plaintiff's response was a Writ of Ejectment which ultimately resulted in the vacation of the premises by the Defendants and an Order of Ejectment. The Plaintiff's persistence on proceeding without meeting is in breach of the express provision of the Lease Addendum she signed February 25, 2010. Plaintiff's failure to discuss mitigation of the damages is also arguably a breach of the Landlord's duty to mitigate damages under basic South Carolina law.

ERVIN'S REQUESTS TO CHARGE-CIVIL GENERAL CONTRACT § 22-7

Damages — mitigation states the law as:

If you find from a preponderance of the evidence that a contract existed between the plaintiff and the defendant, and that the defendant breached that contract, then you must decide whether the plaintiff took reasonable actions to reduce or minimize any damages it may have incurred. 25 C. J. S. *Damages* § 33 (1966); *Rathborne, Hair & Ridgeway Co. v. Williams*, 59 F. Supp. 1 (E. D. S. C. 1945).

A party suffering damages has a duty to exercise reasonable care and diligence to minimize its damages. *Du Bose v. Bultman*, 215 S. C. 468, 56 S. E. 2d 95 (1949); *Fewell v. Catawba Power Co.*, 102 S. C. 452, 86 S. E. 947 (1915) (one seeking to hold another liable for damages must use reasonable efforts to mitigate such damages).

No recovery may be had for losses that a person might have prevented by reasonable efforts and expenditures. 25 C. J. S. *Damages* § 33 (1966); *Rathborne, Hair & Ridgeway Co. v. Williams*, 59 F. Supp. 1 (E. D. S. C. 1945).

The rationale explaining the failure to mitigate damages was described by Defendants in their letter to Plaintiff dated May 6, 2009 as follows:

We currently have 4 vacant buildings in our block from Clifford St. to Queen St., and Kennington-Stobart Gallery is closing on May 23. If you evict us that would total 6 vacant buildings in that block, it would

seem reasonable to assume that you would prefer to have the building occupied and work with us until the situation improves, rather than join the ranks of all the other vacated landlords. While speaking with the other shop owners it has come to our attention that most of the shop owners are paying a square foot rate that is half of what we agreed to in our lease. If you doubt this I would invite you come down and observe the rental rates that are posted in the windows of the vacant buildings.

Defendants argue that Plaintiff's failure to meet and discuss terms which would have allowed the Defendants to stay and continue to pay at least some rents until a replacement tenant could be found was also a breach of Plaintiff's duty to mitigate damages. Accordingly, Defendants argue Plaintiff has failed to mitigate her damages.

THE REASONABLENESS OF PLAINTIFF'S ACTIONS TO MITIGATE DAMAGES IS A QUESTION OF FACT SO THAT THE COURT'S GRANT OF SUMMARY JUDGMENT INAPPROPRIATE

In ERVIN'S REQUESTS TO CHARGE-CIVIL GENERAL CONTRACT § 22-7 Damages — mitigation (Supplement) Judge Ervin states that the reasonableness of a party's actions to mitigate damages is a question of fact. "*Cisson Construction, Inc. v. Reynolds & Assoc., Inc* 311 S. C. 499, 429 S. E. 2d 847 (Ct. App. 1993) (the duty to mitigate losses applies to contracts; the reasonableness of a party's actions to mitigate damages is a question of fact)."

Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c). " When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in a light most favorable to the nonmoving party." *Fleming v. Rose*, 350 S.C. 488, 493 , 567 S.E. 2d 857, 860(2002). In evaluating the Plaintiff's failure to mitigate her damages, the evidence and all reasonable inferences must be viewed in a

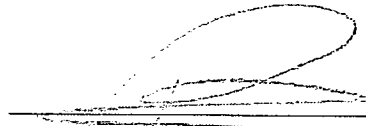
light most favorable to the nonmoving party. Defendants argue that when the facts of this case asserted in the Affidavits of Vicki Smith and Jeffrey Yurfest are considered then a reasonable juror could find that the Plaintiff failed to mitigate her damages . Accordingly, Summary Judgment is inappropriate in this case and the Court should reconsider its Order and vacate its grant of Summary Judgment to Plaintiff in the sum of \$49,361.89.

CONCLUSION

The Defendants argue that the Court should reconsider the Motion and vacate the Order of Judgment to prevent injustice. The Defendants also argue that the Court's Order granting Summary Judgment in the sum of \$49,361.89 is based upon a lease that was induced by a misrepresentation. The Defendants also argue the Courts grant of Summary Judgment should be vacated and the action for damages dismissed as premature since Plaintiff failed to meet with Defendants as she agreed in the Addendum of the Lease which was a condition precedent to further proceedings. In the alternative, the Court's grant of Summary Judgment should be vacated and an Order of Mediation entered in accordance with the SC Rules of ADR. The Defendants also argue that Summary Judgment is inappropriate in this case because the duty to mitigate losses applies to contracts; the reasonableness of a party's actions to mitigate damages is a question of fact. Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c) so the Court should reconsider its Order and vacate its grant of Summary Judgment to Plaintiff in the sum of \$49,361.89. Accordingly, as there remain triable jury issues, the Reference to the Master should also be vacated.

Respectfully submitted.

WHEREFORE, Defendants pray that the Court vacate its Order dated January 28, 2010 and filed February 1, 2010 and dismiss the Plaintiff's action or in the alternative order mediation in accordance with the SC Rules of ADR and for such other and further relief as may be just and proper.



Rolf M. Baghdady
ATTORNEY FOR DEFENDANTS
118 Cobblestone Court
Chapin, South Carolina 29036-9705
T (803) 345-7653
F (803) 345-0180
E rolf@rolfbaghdady.com

Chapin, South Carolina

This 23rd day of February, 2010.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Elizabeth Livingston,	)	
	)	Docket Number: 2009-CP-10-3608
Plaintiff,	)	
	)	
	)	AFFIDAVIT OF VICKI W. SMITH
-vs-	)	
	)	
Danube Valley Exports, LLC,	)	
Vicki W. Smith and William Smith,	)	
	)	
Defendants.	)	

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

I, the undersigned VICKI W. SMITH, being duly sworn, depose and state on oath as follows:

1. I am also known as Vicki Smith.
2. My home in Charleston is located at 232 Rutledge Avenue and it is in foreclosure. Carolina Federal Savings Bank v. William L. Smith, et. al., 2009-CP-10-8085.
3. The Court's order dated January 28, 2010 and filed February 1, 2010 was received by us, after being served by mail, on February 13, 2010.
4. My husband, William Smith, and I, are natives of South Carolina.
5. Mr. Smith is retired and now collects Social Security and is eligible for Medicare here in the USA.
6. At the time of my husband's retirement, we owned a successful travel agency in Germany. In order for Mr. Smith to return to spend his last years with his

Page 1 of 6

family in South Carolina, we:

- A. Arranged the sale of our "American Travel Agency" to a German;
 - B. We purchased a home in Charleston, SC at 232 Rutledge Avenue; and
 - C. We sought to lease space for our antique business and travel desk operating as Danube Valley Exports LLC.
7. After considering the Plaintiff Elizabeth Livingston's property, located at 163 King Street, Charleston, SC, but before signing the lease, we asked our agent Jeff Yurfest of Coldwell Banker Commercial Atlantic International to determine how long it would be before the streetscape that is currently going on would be finished. He reported to me that he checked with Batton and Moore, the agent for Elizabeth Livingston, and reported to me that the work would be completed by the end of 2008 [He remembers the representation being November 2008].
8. We signed the lease based on that representation of Plaintiff's agent.
9. While we were moving in, the adjacent business owners came by the store and in the course of our discussion with them, they revealed that the work would not be finished until August or September 2009.
10. When the streetscape liaison person from the city, Sue Griffin, came by for her weekly visit, she confirmed that the construction would not be completed until August 2009 at the earliest.
11. It became apparent at this point that the information provided to our agent by Plaintiff's agent was a material misrepresentation.
12. We initially began to feel the financial hardship caused by this

Page 2 of 6

Appendix Page 159

FEB 23, 2010 02:40P C T LOWNDES & C

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misrepresentation in early February¹. We went to our agent and asked that he approach Mrs. Livingston's agent about reducing the rent. He made the contact and Mrs. Livingston agreed to reduce the rent to \$1,898.95 for 3 months beginning March 1, 2009 and significantly "Approximately ten days before the end of the three month period (May 22, 09) the Landlord (or its Agent) will meet with the tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for." (Emphasis added by underlining.)

13. A true and correct copy of the Lease Addendum is attached as Exhibit "A".
14. During the last two weeks of February and the entire month of March, the sidewalks were removed and replaced by gangways to allow entrance of the businesses. They cordoned off an area in the street with pylons and tape to create walkways connecting to the gangways. The contractors then promptly parked their large dump trucks and construction equipment in the walkways they had created subsequently blocking all pedestrian traffic. People traveling the sidewalks across the street could not see the storefronts because of the large trucks and equipment and therefore they never ventured across the street. As a result, the businesses on the West side of King Street were void of any pedestrian traffic and therefore had no customers. In April the

¹ Our financial problems were exacerbated because:
The German to whom we sold our travel agency breached the agreement and failed to account and pay over the profits due on sale, and because Bank of America revoked, without cause, 3 credit lines in conjunction with the economic crisis thereby causing us to be unable to pay the airlines the sums due them which ended our travel business.

sidewalks in front of the business were completed, but the northern portion of the block between Clifford Street and Queen Street remained under construction and the trucks and equipment continued to be parked in front of the store.

15. I had never failed to pay our rent on time until April 2009. Around the 20th of April, I spoke with Mrs. Livingston on the phone and explained my situation and told her I would do my best to pay the rent before the end of the month. On May 1, 2009 I paid \$1,000.00 toward the rent for April and wrote Mrs. Livingston a letter along with the check indicating I would try to pay the balance for April the next week; I had tried to call her cell phone 3 times to discuss this matter, but I was never able to reach her.
16. Two days after I mailed the \$1,000.00 check, I received a certified letter from her stating that she would begin eviction if the April and May rents were not paid within 10 days. The letter was not dated or signed.
17. I replied with the letter attached (see Exhibit "B") which was signed by me and dated May 6, 2009. This is a true and correct copy of my communication.
18. We never received a reply to my letter of May 6, 2009.
19. We then asked our agent, Jeff Yurfest, to contact Mrs. Livingston's agent and we still received no reply.
20. Once again we asked our agent to contact her agent and his reply was that she was going to move forward with eviction.
21. It was important that we have some discussion with Mrs. Livingston before June 1, as the addendum to the lease indicated that "Approximately ten days

Page 4 of 6

before the end of the three month period (May 22, 2009), the Landlord (or its agent) will meet with the tenant (or tenant's agent) and determine if an additional period of reduced rent is called for."

22. The Plaintiff breached this term and never met with us.
23. We believe that by failing to work with us, the Plaintiff has failed to mitigate damages and that there is a question of fact for the jury being whether the Plaintiff is entitled to recover any or all damages.
24. Our opinion is based upon the following:

The situation has been very dire for 5 months and all of the landlords of the other businesses in the area have worked with their tenants and continue to do so. It is very troubling that a landlord would not work with a tenant or even sit down and discuss the situation. It also is hard to understand that a reasonable person would not give a struggling tenant the opportunity to try and make some money during Spoleto Festival, one of the busiest and most profitable 17 days of the year for this city, with the hope of paying the lease current.

These are unusual times, the worst this country has seen since the Great Depression. The government, banks and others are all working and making exceptions in an effort to prevent the collapse of businesses. Most landlords would rather work out a flexible method of payment, than have their buildings sit vacant until the economy recovers. There are already 6 vacant buildings on King Street in the block between Clifford Street and Queen Street. Without meeting and reaching an agreement, my only choice is to vacate the

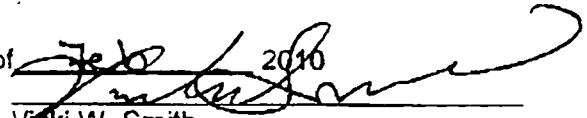
Page 5 of 6

premises. I do not believe I am being unreasonable in light of the material misrepresentation that was made to me by her brokers, Batton and Moore, prior to signing the lease.

25. Since the Plaintiff never sat down with us as required by the contract, we filed a pleading with the Court specifically requesting that the Court "schedule a hearing so that we might discuss these issues with the hope of reaching some compromise that would be beneficial to all the parties involved."
26. Because our *pro se* request for a settlement meeting was unheeded by the Plaintiff and the Court and we perceived that we were unable to retain counsel to effectively advocate our cause, we gave up² and allowed the Plaintiff to offer the proposed order unopposed.
27. We would like the Court to reconsider and vacate its order dated January 28, 2010 and filed February 1, 2010 and grant our *pro se* request and honor the contract by ordering a mediation in accordance with the SC ADR Rules.

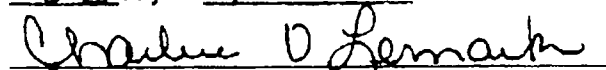
Further affiant sayeth not.

WITNESS my hand this 23 day of Feb 2010


Vicki W. Smith

Sworn to and subscribed before me this

23 day of Feb 2010.



Notary Public, State of South Carolina

My commission expires 7-21-18

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² We especially believed that any effort to fight was hopeless when the Court signed a Rule to Show Cause why we should not be held in contempt of Court for non-payment of rent.

ADDENDUM TO LEASE

In reference to the Lease made and entered into on the 17th day of September, 2008, by and between Elizabeth Livingston Landlord, and Danube Valley Exports covering the real property known as: 163 King Street, Charleston SC, 29401

The undersigned parties hereby agree as follows:

Whereas the lease states in the section under "Rent" that "Tenant shall pay to the Landlord in equal monthly installments of \$3,148.95 (\$2,500.00 base + \$648.95 CAM) for the first year"... both parties agree to amend this section as follows:

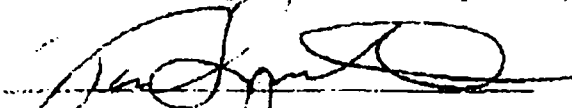
"For the months of March, April & May 2009, Landlord agrees to a reduced rent as follows: \$1,250.00 base plus \$648.95 for a total of \$1,898.95 per month". Approximately ten days before the end of the three month period (May 22, 09), the Landlord (or it's Agent) will meet with the Tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for.

All other covenants and agreements in the original Lease will be in effect.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

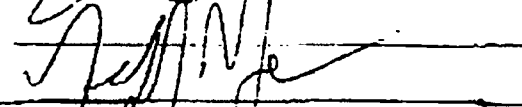
IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

TENANT



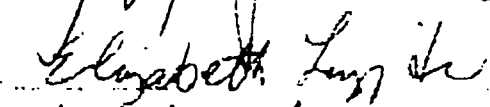
Date 2-27-09

WITNESS:



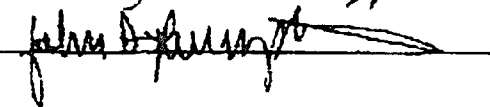
Date 2-27-09

LANDLORD



Date 2-25-09

WITNESS:



Date 2/25/09

Exhibit "A"

Appendix Page 164

163 King St.
Charleston, SC 29401
May 6, 2009

Elizabeth Livingston
2137 Savannah Hwy.
Charleston, SC 29407

Dear Mrs. Livingston:

I am in receipt of your unsigned letter advising of the 10 days you have given me to pay the late rent at 163 King St., or be evicted. Your reputation is that of a reasonable person, so I believed after we talked 10 days ago, that we were in agreement that I would pay you what I could toward the rent until the situation improved on King Street. All of the landlords are working with their tenants to try to help them through this downturn in business and traffic. I told you in our telephone conversation that I would try to pay you something by the end of the month. I mailed you \$1,000.00 on May 1, and I tried to call your cell phone number three times that day to discuss this with you.

We have sold less than \$100.00 in the last seven days and therefore I can tell you now, that I will be unable to pay the \$ 4,082.74 you have requested in the next 8 days for the remainder of April and the total of the May rent. It was our hope that we would get the opportunity to benefit from Spoleto, but this probably will not matter, as we got no benefit from "Southeastern Wildlife", the "Wine and Cheese Festival", the "Antiques Show", and the "House and Garden Tours". This is not just our business that has suffered. We have spoken with all the merchants on our block and they are all experiencing the same lack of sales and traffic. You may not be aware, but the 24/7 cable news sources are continuing to report that things may have turned the corner in the economy, but unemployment and slumping sales may continue for several months to come. This has created a fear factor among the buying public and people are just not spending on anything other than essentials.

We currently have 4 vacant buildings in our block from Clifford St. to Queen St., and Kennington-Stobart Gallery is closing on May 23. If you evict us that would total 6 vacant buildings in that block. It would seem reasonable to assume that you would prefer to have the building occupied and work with us until the situation improves, rather than join the ranks of all the other vacated landlords. While speaking with the other shop owners it has come to our attention that most of the shop owners are paying a square foot rate that is half of what we agreed to in our lease. If you doubt this I would invite you come down and observe the rental rates that are posted in the windows of the vacant buildings. At the time we

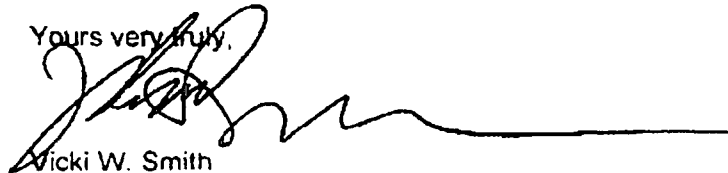
Exhibit "B"

signed the lease we were told that we had the lowest lease on the block. We realize now how stupid we were for putting any trust in the real estate agents.

When we were negotiating the lease with your agent, we asked how long the construction would last. We were told that it would be finished in December and therefore you were willing to grant us an extra two months free rent to compensate for the construction. This was a material misrepresentation of our question as to when the construction would be completed. We later found out from other shop owners, after we had signed the lease, that construction would not be completed until August or September. With the exception of the moratorium on construction during part of November and the whole of December, we have had construction equipment and trucks blocking our entrance daily and impeding foot traffic. For six weeks in February and March there were no sidewalks and the ramps that were put down had construction vehicles and equipment parked in front of them so close that pedestrians found it difficult to enter the ramp. The construction people would put up walkways with pylons and tape to create walking areas in the street in lieu of the sidewalks, and then they would block them by parking their vehicles in the taped off area. Yesterday, we had a huge SCE&G truck and trailer parked in front of our store and they were pulling underground wiring under the sidewalks, so the sidewalks were impassable once again.

Until the traffic returns to lower King St. and the American public begins buying once again, merchants cannot pay the rents that were based on the business generated in prior years. We have had to sell off stocks and other assets to keep this business going. Banks will not loan money for any reason. Now you want to evict us when we are trying to work through this issue. If you would would like to sit down and talk about this we would be happy to meet with you. You can call me at the shop at 577 6220.

Yours very truly,



Vicki W. Smith

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elizabeth Livingston

Plaintiff,

-VS-

Danube Valley Exports, LLC,

Vicki W. Smith and William Smith

Defendants.

)
IN THE COURT OF COMMON PLEAS

Docket Number: 2009-CP-10-3608

AFFIDAVIT OF JEFFREY YURFEST

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

I, the undersigned JEFFREY YURFEST, being duly sworn, depose and state on oath as follows:

1. I am also known as Jeff Yurfest.
2. I reside at 1476 Allen Street, Mt. Pleasant, SC 29464.
3. I, as real estate agent for the Defendants working through Coldwell Banker Commercial Atlantic International negotiated the consummation of the lease with Kit Regnery the listing agent of Batten and Moore for the Plaintiff.
4. Defendants, during the negotiations with Plaintiff, expressed their concern though Vickie Smith about the street improvements at issue in the above referenced action. Thereafter, I contacted the Listing Agent who ultimately represented to me that the project would end in November 2008 and that they would offer 3 months rent while the construction was being completed.

5. The letter attached signed by me dated September 9, 2009 is true and correct.

Further affiant sayeth not.

WITNESS my hand this 22nd day of February 2010

Electronically approved

Jeffrey Yurfest

Sworn to and subscribed before me by telephone and confirmed by e-mail from Affiants Blackberry this 22nd day of February 2010.

Notary Public, State of South Carolina

My commission expires February 26, 2017

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COLDWELL BANKER COMMERCIAL
ATLANTIC INTERNATIONAL, INC.
3506 WEST MONTAGUE AVE
CHARLESTON, SC 29418
OFFICE (843) 744-9677
FAX (843) 744-9679

September 9, 2009

Re 163 King Street
Charleston, SC

Dear Vicki,

Per our conversation, this is my account of the construction timeline. Prior to signing the lease at 163 King St., you had asked me to inquire about the end date for the Streetscape construction on lower King Street. As I did not know, I had asked the listing agent Kit Regnery from Batten and Moore, if he knew, as you had reservations about signing the lease during the construction project.

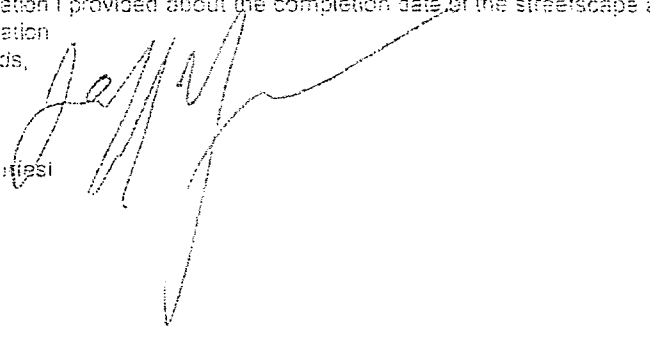
Kit told me that the streetscape construction would end in November 2008, prior to Thanksgiving, the peak Christmas buying period. He stated that the Landlord would offer you free rent in September, October, and November, while the construction was being completed. You said that this would be acceptable and you signed the lease.

When we spoke about this matter back in the May or June 2009, you indicated that you were upset because the Streetscape was still on-going and that the city was indicating the completion date was originally August 2009, but they were currently running a month behind. You asked me to find out from Batten and Moore if the information they provided you back in September was correct, and if so, where did they obtain this information. Kit stated to me that he was told by the City of Charleston that the construction would be completed in November 2008.

I hope this clears up any questions you might have about the circumstances surrounding the information I provided about the completion date of the streetscape and how I obtained that information.

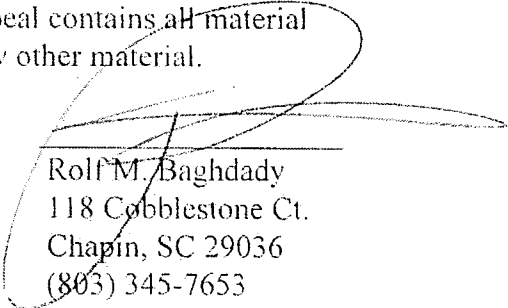
Regards,

Jeff Yutisi

A large, stylized handwritten signature in black ink, appearing to read 'Jeff Yutisi', is written over the typed name and extends across the middle of the page.

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 14, 2010



Rolf M. Baghdady
118 Cobblestone Ct.
Chapin, SC 29036
(803) 345-7653
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-3608

Elizabeth Livingston,

Respondent,

v.

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

Appellants.

INITIAL BRIEF OF APPELLANTS

Rolf M. Baghdady
118 Cobblestone Court
Chapin, South Carolina 29036-9705
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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ENTERING AN ORDER ON AMOUNT OF RENT DUE WHEN VACATION OF THE PREMISES WAS NOT AT ISSUE?

STATEMENT OF THE CASE

On May 15, 2009, Elizabeth Livingston brought this action for ejectment 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. On June 25, 2009 Elizabeth Livingston filed an amended summons and complaint to include the individual Defendants Vicki W. Smith and William Smith. Danube Valley Exports, Vicki W. Smith and William Smith answered with a counterclaim and jury trial demand. A Rule to Vacate or Show Cause hearing was held on September 9th and 11th 2010, and the order was entered on September 18, 2010 ordering vacation of the premises and payment of rent.

On November 12, 2010 another Rule to Show Cause was entered ordering Danube Valley Exports, Vicki W. Smith and William Smith to show cause why they should not be held in contempt of the Order of September 18, 2010 and the relief in the petition granted. On February 1, 2010 the Court entered judgement on the Rule to Show Cause.

On February 13, 2010 Danube Valley Exports, Vicki W. Smith and William Smith received the judgement. On February 23, 2010 Danube Valley Exports, Vicki W. Smith and William Smith filed their Motion for Reconsideration. On April 22, 2010 Danube Valley Exports, Vicki W. Smith and William Smith received by mail the order filed April 9, 2010 denying their Motion for Reconsideration. On May 24, 2010 Danube Valley Exports, Vicki W. Smith and William Smith served the Notice of Appeal on Elizabeth Livingston.

ARGUMENTS

I. 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.

Eban Cockley, Counsel for Danube Valley Exports, Vicki W. Smith and William Smith clearly stated to the Court that vacation of the premises was not at issue:

THE COURT: And, counsel, is your client prepared to vacate the premises within 14 days—

MR. COCKLEY: Yes they are. (R. p. 119, lines 1-3)

Whereupon, Counsel for Elizabeth Livingston argued that the Court also order back rent be paid:

MR. MULLER: I think through the issuance of a rule to vacate or show cause, this court is still allowed as security, to enforce that the defendants pay back rent...(R. p. 120, lines 10-13)

Whereupon Counsel for Danube Valley Exports, Vicki W. Smith and William Smith objected:

MR. COCKLEY:...and under those circumstances, we don't think it is warranted that this Court make a determination that my client pay any monies into the clerk of court as security for a judgement that plaintiff has not been awarded...(R. p. 121, lines 10-15)

The Court then entered an order that Danube Valley Exports vacate AND (emphasis added) that Danube Valley Exports pay \$17,852.75 to the Court.(R. p. 44) This is error. This is error because SC Code § 27-37-155 (B)(5) provides, *inter alia*,:

If the tenant fails to make a payment as provided in Section 27-37-150 and this section, the tenant's failure to comply entitles the landlord to execution of the

judgment for possession and, upon application of the landlord, the magistrate shall issue a warrant of ejectment and the landlord must be placed in full possession of the premises by the sheriff, deputy, or constable.

This provision of the code is clear that the amount preliminarily determined is merely a condition of tenancy for which the failure to pay is remedied by a warrant of ejectment.

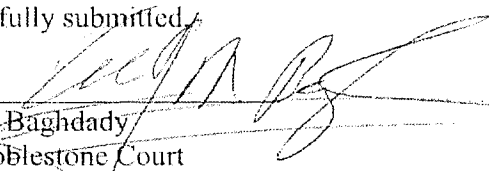
That the amount is only preliminarily determined is clear from SC Code § 27-37-155 (B)(2) which provides "In the event that the amount of rent is in controversy, the court shall preliminarily determine the amount of rent to be paid to the landlord." Accordingly, the Court's order filed September 18, 2009 stating that Danube Valley Exports pay \$17, 852.75 in rent was in error. Since the amount of damages has not yet been determined, this case should be remanded back to the Circuit Court for appropriate proceedings in accordance with the pleadings of the parties and the Jury Demand by Danube Valley Exports, Vicki W. Smith and William Smith. (R. pp. 81-83)

CONCLUSION

Because of the Circuit Court's error, this Court should reverse the judgments of the Circuit Court and remand the case for further proceedings on the pleadings to determine the amount of rent and/or damages on the counterclaim that are due.

January 2, 2011

Respectfully submitted,


Rolf M. Baghdady
118 Cobblestone Court
Chapin, South Carolina 29036-9705
(803) 345-7653
Attorney for Appellants

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE NINTH JUDICIAL CIRCUIT

Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-3608

Elizabeth Livingston

Respondent,

v.

Danube Valley Exports, LLC

Vicki W. Smith, and William Smith

Appellants

FINAL BRIEF OF RESPONDENT

Alice E. Paylor
Timothy J. W. Muller
Rosen, Rosen & Hagood, LLC
134 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-6726

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE RESPONDENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW WHERE NO GENUINE ISSUE OF MATERIAL FACT EXISTS.
- II. APPELLANTS' SOLE ARGUMENT SHOULD NOT CONSTITUTE GROUNDS FOR APPEAL BECAUSE THE TRIAL COURT'S ORDER OF SEPTEMBER 18, 2009 DID NOT AFFECT THE TRIAL COURT'S SUBSEQUENT GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.
- II. IN THE EVENT APPELLANTS' ARGUMENT IS DEEMED GROUNDS FOR APPEAL, THE TRIAL COURT'S ORDER OF SEPTEMBER 18, 2009 WAS A PROPER APPLICATION OF THE SOUTH CAROLINA CODE.

STATEMENT OF THE CASE

Respondent Elizabeth Livingston ("Respondent") and Appellant Danube Valley Exports, LLC ("Appellant Danube") entered into a lease agreement for a one story building in Charleston, South Carolina on September 17, 2008, whereby Appellant Danube would occupy the premises as tenant. On May 15, 2009, Respondent applied to eject Appellant Danube and for a rule to vacate or show cause in Charleston County Magistrate's Court for its failure to pay rent and breach of the lease agreement. On May 29, 2009, Appellant Danube submitted an answer and counterclaim to Respondent's eviction application, alleging it had damages in excess of \$7,500 and that the Circuit Court had jurisdiction over the matter.

On June 25, 2009, following the transfer of the action to the Charleston County Court of Common Pleas, Respondent submitted an amended summons and complaint, asserting causes of action for breach of contract and ejectment of tenants. On July 21, 2009, Appellants submitted another answer and counterclaim, making nearly identical allegations as their earlier answer, but further demanding a jury trial. On July 15, 2009, Respondent filed a motion to vacate or show cause and writ of ejectment and supporting memorandum of law against Appellant Danube in order to evict Appellant Danube for its refusal to pay rent and to recover or secure mounting past due and accruing rent. The motion was heard on September 11, 2009, at which time Appellant Danube remained in the premises without paying rent. After hearing oral arguments, Judge Harrington issued an order on September 14, 2009 and filed September 18, 2009. (hereinafter "September 18, 2009 order") This order required Appellant Danube to vacate the leased premises within ten (10) days from the issuance of the order and required Appellant Danube to pay to the Clerk of Court \$17,852.75 in unpaid rent within forty (40) days as security during the pendency of the action. At the expiration of the forty days, Appellant Danube had vacated the

leased premises but failed or refused to pay the unpaid rent to the Court as required by the trial court's order.

On October 12, 2009, Respondent filed a motion for summary judgment against all Appellants in this matter. Respondent filed supporting affidavits and a memorandum of law in support of her motion for summary judgment. After hearing oral arguments and presumably considering the affidavits, pleadings, lease agreement, personal guaranties filed as record and any other evidence relevant to this matter, the trial court granted Respondent summary judgment to her breach of contract claim and against Appellants' counterclaim as a matter of law.

Appellants' new counsel then filed a motion for reconsideration of the judgment granting summary judgment. Again, the trial court heard oral arguments, received memorandums from counsel, and Appellants' motion for reconsideration of the judgment granting summary judgment to Respondent was denied on January 28, 2010. Appellants assert they received a copy of the order denying their motion to reconsider by mail on April 22, 2010 and thereafter filed their notice of appeal to this Court on May 24, 2010.

STATEMENT OF FACTS

Respondent is the owner of a small one-story building located at 163 King St. Charleston, South Carolina. On September 17, 2008, Respondent and Appellant Danube entered into the lease agreement for the building (the "premises"). (R. p. 18-22) (hereinafter "Lease Agreement") Appellants Vicki W. Smith and William Smith signed personal guaranties to the lease agreement in the event Respondent could not recover rent or damages from Appellant Danube. (R. p. 23) Appellant Danube agreed to lease the premises for a period of five (5) years commencing on October 1, 2008. (R. p. 18 at ¶ 2) The expiration of the lease term is September 30, 2013. (R. p. 18 at ¶ 2)

In the lease agreement, the parties agreed that Appellant Danube would pay Respondent in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. (R. p. 18 at ¶ 4) The lease agreement further provides that Appellant Danube will incur a 15% late fee per month for any rent not received by the fifth (5th) day of each month. (R. p. 18 at ¶ 2) In the event of default by Appellant Danube, the lease agreement provides that Appellant Danube is responsible for all costs incurred by Respondent in bringing legal proceedings to enforce Appellant Danube's obligations, including reasonable attorney's fees. (R. p. 20 at ¶ 19) Appellant Danube was given the first two months free rent in lieu of any tenant up fit by Respondent, with Appellant Danube's first rent being due on December 1, 2008. (R. p. 18 at ¶ 4)

Appellant Danube paid rent for December 2008, January 2009, and February 2009. On February 27, 2009, after Appellants communicated concerns to Respondent about the poor state of their retail business, Respondent and Appellant Danube signed an addendum agreeing that Appellant would pay one-half of its normal rent, in the amount of \$1,898.95, for the months of March, April, and May, 2009 only. (R. p. 24) Appellant Danube paid the one-half rent for March and failed to pay rent due for April. See (R. p. 59-60) On or about April 22, 2009, after repeated attempts by Respondent to reach Appellants regarding past due rent, Appellant Vicki W. Smith contacted Respondent to inform her they would be unable to pay rent for April. See (R. p. 59-60) On May 1, 2009, Respondent sent Appellants a certified letter requesting rent payment for April and May and the late fee pursuant to the lease agreement, in the amount of \$4,082.74. Appellants submitted a check for \$1,000 to Respondent on May 4, 2009, but thereafter refused to make further payment and remained in the premises. See (R. p. 60 at ¶ 1)

In response to Respondent's application to eject Appellant Danube and for a rule to show cause, Appellants filed an answer and counterclaim alleging damages. In support of their damage allegation, Appellants argued that the City of Charleston's street beautification project of lower King Street (hereinafter "streetscape project") and the poor economy had caused their business economic harm. (R. p. 56-58 at ¶ 7-8; R. p. 59-60) This streetscape project is believed to have been wholly operated by the City of Charleston and its employees or contractors, and Respondent had no control or influence over this project. (R. p. 38-39; 36 [The affidavit of Kit Regnery has a pagination error in the record on appeal. The document begins on p. 38, continues on p. 36, and ends on p. 39]) Furthermore, the streetscape project had commenced prior to the parties entering into the lease agreement and was thereby a foreseeable event to both parties. (R. p. 38-39, 36; see also R. p. 81-83)

ARGUMENT

The trial court's order granting summary judgment should be affirmed because Respondent is entitled to judgment as a matter of law where no genuine issue of material fact exists. Appellants' sole argument on appeal is their contention with the trial court's September 18, 2009 order directing Appellants to vacate the leased premises and deposit previously owed rent to the Court as security during the ongoing pendency of the action. Because this order did not affect the granting of summary judgment and Appellants likewise failed to comply with the September 18, 2009 order, Appellants' argument should not be grounds for appeal. However, even if Appellants' argument is deemed grounds for appeal, the trial court's September 18, 2009 order was a proper application of the South Carolina ejectment statutes.

I. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE RESPONDENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW WHERE NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

In particular, summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 317, 106 S. Ct. 2548, 2550 (1986); Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). As stated by the South Carolina Supreme Court in Baughman,

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman, 306 S.C. at 115-116, 410 S.E.2d at 545-546 (internal citations omitted).

A. Respondent's Breach of Contract Claim

Where there is present on a motion for summary judgment a question as to the construction of a written agreement that can be determined by a consideration of the plain and unambiguous language of the contract, the question as one of law may be resolved by the court. Lyles v. BMI, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987); citing First-Citizens Bank & Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984). By failing to pay rent when due, Appellant Danube breached its lease agreement with Respondent. The language of the lease agreement is unambiguous and incapable of more than one construction: Danube was contractually obligated, for a period of five (5) years, to pay Respondent in equal monthly installments of \$3,148.95 for the first year, and an increase of 3% for year two and each year of the extended term to be added to the base rent for the previous year, rent being due on the first day of each and every calendar month. In addition, "[a]ll rentals due hereunder which are not received by the Landlord by the fifth (5th) day of each month shall be subject to a delinquency charge of FIFTEEN percent (15%) per month on the unpaid balance; occurring from the first day of every month for which rental is due but unpaid." (R. p. 18 at ¶ 4) While this rent amount was reduced in half, by addendum, for the months of March, April, and May of 2009 only, Danube stopped paying rent in April and elected to remain in the premises without paying rent. Danube's failure to pay rent when due, failure to cure its default, and subsequent refusal to vacate the premises after it ceased paying rent undoubtedly amount to a breach of the lease agreement.

Upon Danube's failure to pay rent when due and failure to cure such default of the lease agreement, paragraph 19 addresses "Default and Remedies." In accordance with paragraph 19 of

the lease agreement, Respondent was forced to institute legal proceedings to reenter the premises when Danube refused to pay rent and vacate. (R. p. 20 at ¶ 19) This same paragraph holds Appellant Danube liable to Respondent for any deficiency Respondent may incur in her attempt to relet the premises and to pay all costs incurred by Respondent in having to bring these legal proceedings, including reasonable attorney's fees. Id. The damages recoverable to Respondent pursuant to this agreement are in accordance with South Carolina law. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996) (purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if contract had been performed).

Moreover, the obligations of Appellant Danube are binding upon Appellants Vicki W. Smith and William Smith in accordance with their signed personal guaranties to the lease agreement. As stated in the lease agreement guaranty page, Respondent permitted Appellant Danube to be named as tenant on the lease only upon the signing of personal guarantees by Appellants Vicki W. Smith and William Smith. (R. p. 23) Upon Appellant Danube's failure to pay rent, the personal guaranties bind Appellants personally thereafter for "all costs, expenses, and damages, including but not limited to attorney's fees, that may arise in consequence of the non performance. . ." Id. Accordingly, all Appellants are liable for Appellant Danube's breach of the lease agreement.

The plain language of the lease agreement and personal guaranties are unambiguous and their interpretation is one of law which was properly resolved by the trial court. Appellants breached the lease agreement and are liable for unpaid rent, late fees, the costs incurred in bringing these legal proceedings, including reasonable attorney's fees, along with any deficiency Respondent may incur in her attempt to relet the premises during the lease period which expires

on September 30, 2013. Because there are no genuine issues of material fact in the interpretation of this unambiguous agreement, and Appellants have raised none in this matter, the trial court properly granted Respondent summary judgment to her lone breach of contract claim as a matter of law.

B. Appellants' Answer and Counterclaim

Appellants' answer and counterclaim likewise contain no genuine issue of material fact and the trial court properly granted Respondent's motion for summary judgment on this basis. Appellants' counterclaim alleges that the terms of their lease agreement require Respondent "to deliver peaceful occupation" and "to provide reasonable commercial access to the property for the [Appellant] and her customers." (R. p. 82 at ¶ 7) *Appellants' allegation is false – there are no such terms contained in the lease agreement.* To the contrary, paragraph nine (9) of the lease agreement states:

c) After the fifteen (15) day notice period, Tenant accepts the Premises in the condition in which they are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased Premises, or the uses to which the leased property may be put. *The Landlord shall not be responsible for any latent defect or change of condition in the Premises, improvements, and personality, or of title, and the rent hereunder shall not be withheld or diminished on account of and defect in the Premises, any change in the condition thereof, and damage occurring thereto,* or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

(R. p. 19 at ¶ 9, §c) Moreover, Paragraph twenty-one (21) of the lease agreement, which pertains to "quiet enjoyment," merely states that Appellant Danube shall receive no interference from Respondent or anyone claiming a right of title to the property during the lease period. (R. p. 21 at ¶ 21) Respondent had no control over the City of Charleston's streetscape project and its completion or Appellant Danube's poor retail profitability during its time operating at the

premises. Accordingly, Appellants' allegations that Respondent broke terms not contained within the lease agreement are completely without merit.

Appellants also alleged that the City of Charleston's streetscape project, already in progress at the signing of the lease, and their understanding of its completion date, caused Appellants economic harm and should thereby preclude the enforcement of the lease agreement. See (R. p. 81-83; R. p. 59-61) Nowhere in Appellant Danube's lease agreement is there language or terms pertaining to the streetscape project identified in their counterclaim. Appellants' vague allegation that an oral representation as to the completion date of the City-controlled project should be considered in resolving their breach of the lease agreement is simply barred by the parol evidence rule.

"It is well established in South Carolina that parole evidence is inadmissible to vary or contradict the terms of an agreement reduced to writing." Young v. McKelvey, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985). "[A] written agreement between two persons merges all prior talk and negotiations about the subject of the agreement. Words cannot be read into a contract which import intent wholly unexpressed when the contract was executed." Parker v. Byrd, 309 S.C. 189, 192, 420 S.E.2d 850, 852 (1992). Moreover, "it is not proper to receive testimony to vary or contradict the terms of such agreement." Gantt v. Van der Hoek, 251 S.C. 307, 317, 162 S.E.2d 267, 272 (1968). Because the City of Charleston streetscape project was not a term of the lease agreement, Appellants' allegation and any proposed testimony on this issue is barred by the parol evidence rule.

Even if the parol evidence rule were not deemed to bar consideration of this issue, no claim lies for any alleged harm based on Appellants' understanding of the streetscape project's completion date. While Appellants failed to identify any particular cause of action in their

counterclaim, no possible claim could exist under these circumstances. Paragraph eight of Appellants' answer and counterclaim states that "[u]nknown to the Appellant, but known to the Appellant and/or her agents, the city's construction project would, for an unreasonably long period of time, preclude the Appellant's reasonable commercial use of the property, and is so precluding such use."¹ (R. p. 82 at ¶ 8) However, in paragraph six, Appellants correctly state that at the time the parties entered into the lease "[c]onstruction on King Street improvements and renovations by the City of Charleston was then in progress." Id. at ¶ 6. The fact that this project was in progress at the time of the signing of the lease makes the streetscape project clearly foreseeable at the time the lease was signed and any understanding as to the completion of the City-controlled project was thus a future event.

Although not specifically alleged by Appellants, no action lies here for frustration of purpose or negligent misrepresentation. The doctrine of frustration is only available where a supervening event is unforeseeable. Sanchez v. Tilley, 285 S.C. 449, 451, 330 S.E.2d 319, 320 (Ct. App. 1985). Regarding negligent misrepresentation, the rule under South Carolina law is that for a false representation to be actionable, it must relate to a present or preexisting fact that is false when made and cannot ordinarily be based on unfulfilled promises or *statements as to future events*. Private Mortg. Inv. Svcs., Inc. v. Hotel & Club Assocs., 296 F.3d 308 (4th Cir. 2002) (emphasis added); see also Sauner v. Pub. Svc. Auth. of S.C., 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003) ("Representations based on statements as to future events or unfulfilled promises are not usually actionable.") Moreover, the negligent misrepresentation element of justified reliance only exists where the relationship of the parties is such that one party occupies

¹ As stated, the lease agreement does not contain any terms obligating Respondent to provide Appellant Danube "commercial use" or "access" to the premises.

a superior position to the plaintiff with respect to knowledge of the truth of the statement. Gruber v. Santee Frozen Foods, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992).

Appellants allege in their counterclaim that Respondent or her agent knew that the City's streetscape project would take longer than Appellants understood. The completion date of the then existing streetscape project or any understanding thereof would have been a future event at the time of the lease agreement's signing. Furthermore, neither Respondent nor her leasing agent had a superior position of knowledge regarding the completion of the City of Charleston's streetscape project. Appellants and their agent were just as capable of contacting the City regarding an estimated completion date. As indicated in the Affidavit of Kit Regnery, the project was subsequently delayed, in part, at the request of the retailers themselves to take advantage of the long holiday shopping season. (R. p. 39) Because the completion date of the City's streetscape project was merely speculative, under the control of the City of Charleston, and was a future event, no action could possibly exist for negligent misrepresentation under these circumstances. As mentioned, if the streetscape project was truly an issue at the time of the signing of the lease, such a term could have been included and bargained for in the lease agreement prior to its execution, but the inclusion of such a term now is precluded by the parol evidence rule.

Based on the foregoing, no genuine issue of material fact exists in Appellants' counterclaim and answer in this matter. Regardless of what can be discerned from their pleadings, Appellants failed to make a showing of the essential elements of their counterclaim. Even in a light most favorable to Appellants, no evidence presented in this action demonstrates that Appellants have satisfied this burden of proof for which they would ultimately bear the burden of proof at trial. "In such a situation, there can be no genuine issue as to any material

fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Baughman, 306 S.C. at 115-116, 410 S.E.2d at 545-546 (1991). Accordingly, the trial court appropriately granted Respondent's motion for summary judgment to Appellants' counterclaim and this ruling should be affirmed.

II. APPELLANTS' SOLE ARGUMENT SHOULD NOT CONSTITUTE GROUNDS FOR APPEAL BECAUSE THE TRIAL COURT'S ORDER OF SEPTEMBER 18, 2009 DID NOT AFFECT THE TRIAL COURT'S SUBSEQUENT GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

Appellants' only argument in appealing the trial court's granting of summary judgment to Respondent is their contention with the trial court's September 18, 2009 order directing Appellants to vacate the premises and pay accrued rent to the Court during the pendency of the action. See Intial Brief of Appellants, dated Oct. 13, 2010. The trial court issued this order in response to Respondent's motion for a rule to vacate or show cause and writ of ejectment against Appellant Danube for its refusal to pay rent and refusal to vacate the premises in disregard of the parties' lease agreement.

The September 18, 2009 order, through the issuance of a rule to vacate or show cause, ordered Appellant Danube to vacate the leased premises and deposit the accrued unpaid rent to the Clerk of Court during the pendency of the action. See (R. p. 44) This order was necessary and indeed appropriate where Appellant Danube refused to vacate the premises and also refused to pay rent. At the same time, Respondent incurred costs for the property and received no rental income during the delay caused by Appellants' counterclaim and transfer to circuit court. Although Appellant Danube eventually vacated the premises following the trial court's ruling, nearly six months after it ceased paying rent, Appellant Danube thereafter refused to remit the accrued rent to the Clerk of Court. While Appellants now cite this as an argument for their appeal, Appellants never in fact paid the rent to the Court as directed by the September 18, 2009

order. More importantly, there is no indication that this order had any bearing on the trial court's ultimate grant of summary judgment to Respondent in this matter.

As addressed herein, the trial court properly applied the law in issuing its September 18, 2009 order. However, even if it were deemed an incorrect application of law, Appellants failed to comply with the order, thereby rendering this argument irrelevant for purposes of reversing the trial court's ultimate granting of summary judgment to Respondent. See JTK Co., Inc. v. Hardwick, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("An error not shown to be prejudicial does not constitute grounds for reversal.") The trial court had the full opportunity to consider whether any genuine issues of material fact existed in Respondent's motion for summary judgment, subsequently heard on January 26, 2010. Because the trial court's September 18, 2009 order had no bearing on the trial court's granting of summary judgment, Appellants' argument should not constitute grounds for appeal and the trial court's order granting summary judgment to Respondent should be affirmed.

II. IN THE EVENT APPELLANTS' ARGUMENT IS DEEMED GROUNDS FOR APPEAL, THE TRIAL COURT'S ORDER OF SEPTEMBER 18, 2009 WAS A PROPER APPLICATION OF THE SOUTH CAROLINA CODE.

Under the South Carolina ejectment statutes, the landlord or his or her attorney must apply with a court having jurisdiction for a written rule requiring the tenant to vacate the premises or to show cause why the tenant should not be ejected within ten days. S.C. Code Ann. § 27-37-20 (2009). Grounds for ejectment of a tenant occur when the tenant fails or refuses to pay the rent when due or demanded or when the terms or conditions of the lease have been violated. Id. at § 30. When a tenant fails to show cause, the judge shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the Sheriff of the county. Id. at § 40. Section 150 further provides that after the commencement of ejectment

proceedings through a rule to vacate or show cause, the rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises. Id. at § 150.

In 2006, an additional section was added to further address ejectment actions involving commercial lease contract claims and counterclaims. See S.C. Jur. Landlord and Tenant § 57 (2009). This section provides,

(A) In any action involving a commercial lease where the landlord sues for possession and the tenant raises defenses or counterclaims pursuant to this chapter or the lease agreement:

(1) the tenant is required to pay the landlord all rent which becomes due after the issuance of a written rule requiring the tenant to vacate or show cause as rent becomes due and the landlord is required to provide the tenant with a written receipt for each payment except when the tenant pays by check; and

(2) the tenant is required to pay the landlord all rent allegedly owed prior to the issuance of the rule; provided, however, that in lieu of the payment the tenant may be allowed to submit to the court a receipt and cancelled check, or both, indicating that payment has been made to the landlord.

S.C. Code Ann § 27-37-155(A). In the event that the amount of rent is in controversy, the court shall preliminarily determine the amount of rent to be paid to the landlord. Id. at § 155(B)(2).

The court is specifically provided with the authority to order the tenant to pay all rent due and accruing as of and during the pendency of the action. See id. at § 155(B)(5). If the tenant fails to make payment as provided in these sections, the tenant's failure to comply entitles the landlord to execution of the judgment for possession. S.C. Code Ann. § 155(B)(5).

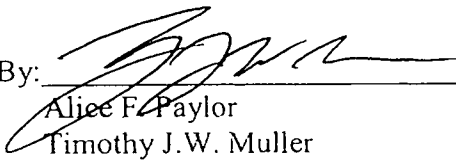
These ejectment statutes provide the trial court with the authority to resolve Respondent's motion to vacate or show cause and writ of ejectment. The essence of Appellants' argument is that these statutes were unavailable to the trial court because possession was not at issue – this is inaccurate. As previously noted, Appellant Danube paid its last monthly rent payment for March

2009 but failed to vacate the premises until after the trial court's September 18, 2009 ruling. During this time, Appellants refused to remit any payment to Respondent or the Court. While Appellants' former counsel asserted that Appellant Danube was prepared to vacate the premises within fourteen days, the fact is that Appellant remained rent-free in the premises at the time the motion was heard, making possession clearly an issue for the trial court to address. Therefore, the trial court's September 18, 2009 order, through the issuance of a rule to vacate or show cause, was a proper application of the law and the trial court's subsequent granting of summary judgment to Respondent should be affirmed.

CONCLUSION

Because of Appellant's breach of the lease agreement is an interpretation of law and no genuine issues of material fact exist, this Court should affirm the trial court's motion for summary judgment against Appellants.

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December 21, 2010
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-3608

Elizabeth Livingston,

Respondent,

v.

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

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. **MAY THE TRIAL COURT'S ERROR IN ENTERING AN ORDER ON AMOUNT OF RENT DUE WHEN VACATION OF THE PREMISES WAS NOT AT ISSUE BE SUSTAINED BY A SUBSEQUENT MOTION FOR SUMMARY JUDGEMENT SCHEDULED BY A RULE TO SHOW CAUSE FOR CONTEMPT FOR FAILURE TO PAY THE ORDERED AMOUNT?**
2. **IS THERE A GENUINE ISSUE OF MATERIAL FACT SO THAT THE MOTION FOR SUMMARY JUDGEMENT SHOULD NOT BE AFFIRMED?**

ARGUMENTS

- I. **BECAUSE THE SC CONSTITUTION PROTECTS THE RIGHT OF ACCESS TO THE COURTS AND PROHIBITS IMPRISONMENT ON A CONTRACTUAL DEBT, THE TRIAL COURT'S ERROR IN ENTERING AN ORDER ON AMOUNT OF RENT DUE WHEN VACATION OF THE PREMISES WAS NOT AT ISSUE MAY NOT BE SUSTAINED BY A SUBSEQUENT MOTION FOR SUMMARY JUDGEMENT SCHEDULED BY A RULE TO SHOW CAUSE FOR CONTEMPT FOR FAILURE TO PAY THE ORDERED AMOUNT.**

The Respondent's Brief argues " Because the trial court's September 18, 2009 order had no bearing on the trial court's granting of summary judgement, Appellants's argument should not constitute grounds for appeal and the trial court's order granting summary judgement to respondent should be affirmed." [Respondents Brief Page 14]

This is factually not so. The hearing on Motion for Summary Judgment was scheduled in connection with the Order dated November 10,2009, filed November 12,2009 with Lease Agreement, Addendum to Lease, Motion for Rule, Memorandum in Support of Motion for Rule to Vacate or Show Cause and Writ of Ejectment of September 10,2009, Order dated September 14,2010 filed September 18, 2010, Plaintiff's Motion for Summary

Judgement filed October 12, 2009, Affidavit of Kit Regnery of October 6, 2009, Affidavit in Support of Attorney Fees of October 12, 2009 and cover letter. (R. pp. 16-43) The order dated November 10, 2009 filed November 12, 2009 ordered Appellants to show cause why Appellants “ should not be held in contempt of Judge Harrington’s order dated September 14, 2009.” (R. pp. 16-43) Judge Harrington’s Order dated September 14, 2009 filed September 18, 2009, *inter alia*, ordered Appellants to pay \$17,852.75. (R. P. 44)

The South Carolina Constitution prohibits imprisonment for debt on a contractual claim. No person shall be imprisoned for debt except in cases of fraud. S.C. Const. Art. I, § 19. In this case, Appellants argue that the tie between the Rule to Show Cause for Contempt, impliedly ordering Appellants to show why they should not be imprisoned for failure to pay the sum ordered on a contract claim, violated the right of access to the Courts that is protected by the South Carolina Due Process Clause. The S.C. Due Process clause states: “The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. Const. art. I, § 3.

The South Carolina Court of Appeals in Harrison v. Harrison, 373 S.C. 524, 646 S.E.2d 180 (S.C. App. 2007) cited with approval the United States Supreme Court case of Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971) finding a right of access in the Due Process clause. *Harrison* and *Boddie* addressed access to the Courts in the context of the fundamental right to dissolution of marriage. Closer to the

right of access issue in this case is the US Supreme Court case of Lindsey v. Normet, 405 U.S. 56 , 92 S.Ct. 862, 31 L.Ed.2d 36 (1972)

The Supreme Court distinguished landlord tenant actions as follows: “There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants.” Lindsey at 72. **But** after affirming abridged right of access to tenants in possessory actions, the Supreme Court stated that the imposition of additional requirements that bear no reasonable relationship to any state objective are a violation of the Due Process Clause. *id.* 76.

Accordingly, Appellants argue that the order dated November 10, 2009 filed November 12, 2009 that ordered Appellants to show cause why Appellants “ should not be held in contempt of Judge Harrington’s order dated September 14, 2009 that, *inter alia*, ordered Appellants to pay \$17, 852.75 (R. p. 44) when tied together with the Respondent’s Motion for Summary judgement unreasonably violated the Appellants’ right of access to the Courts so that the entry of the Order on Motion for Summary Judgement violated the Appellants’ right to Due Process protected by the S.C. Constitution.

Accordingly, the Trial Court’s error in entering an order on amount of rent due when vacation of the premises was not at issue may not be sustained by a subsequent motion for summary judgement scheduled by a rule to show cause for contempt for failure to pay the ordered amount.

II. BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT, THE MOTION FOR SUMMARY JUDGEMENT SHOULD NOT BE AFFIRMED

The Respondent's argue " the trial court properly granted Respondent's motion for summary judgement to her lone breach of contract claim" [Respondent's Brief at Page 9] and "appropriately granted Respondent's motion for summary judgement to Appellants' counterclaim [Respondent's Brief at Page 13]. Appellants reply that the Court erred in granting Summary Judgement and should instead have granted Appellants' Motion for Reconsideration.

Accordingly, the Appellants incorporate that argument here: Unbeknownst to the Court when it signed its order of January 28, 2010 is the series of financially calamitous and depressing events that allowed the Court to grant summary judgment in the sum of \$49,361.89.

The Appellants, William Smith and Vicki Smith, are natives of South Carolina. (R. p. 155) Mr. Smith is retired and now collects Social Security and is eligible for Medicare. (R. p. 155) At the time of Mr. Smith's retirement, the Smiths owned a successful travel agency in Germany. In order for Mr. Smith to return to spend his last years with his family in South Carolina, the Smiths:

1. Arranged the sale of their "American Travel Agency" to a German;
2. The Smiths purchased a home in Charleston, SC at 232 Rutledge Avenue; and
3. The Smiths leased the space at issue in the instant action for their antique business and travel desk. . (R. pp. 155-156)

The German, to whom they sold their agency, has breached the agreement and

failed to account and pay over the profits due on sale. Bank of America revoked, without cause, three (3) credit lines in conjunction with the economic crisis, thereby causing the Smiths to be unable to pay the airlines the sums due them which ended their travel business. (R. pp. 156-7) Also, the Respondent's real estate agent, Kit Regnery, misrepresented to Appellants and induced the Appellants to believe that the King Street project by the City of Charleston would be completed by November 2008. (R. p. 156) However, this renovation project was not completed on that date, thus blocking customer access to the Smith's retail store,. (R. pp. 156-158) which caused the Smiths to lose nearly all of the income and cash flow they needed to pay their rent due Respondent, their living expenses and mortgages. Subsequently at this time, even their Charleston home is in foreclosure. Carolina Federal Savings Bank v. William L. Smith, et. al., 2009-CP-10-8085.

The direct consequence of the series of financially calamitous events in this case was that the Appellants perceived that they were unable to retain counsel to effectively advocate their cause and instead it was largely handled *pro se*. Accordingly, the Appellants gave up. (R. p. 160) and allowed the Respondent to offer unopposed the proposed order. This motion argues that the Court should reconsider the motion and vacate the order of judgment to prevent injustice.

Judgment Based upon Misrepresentation

The Court's Order granting Summary Judgment is based on breach of a lease. The lease, upon which the judgment was based, was entered into by Appellants in reliance upon a misrepresentation and inducement by Respondent's agent to Appellants' agent.

Respondent's agent was Kit Regnery of Batten and Moore. Appellants' agent was Jeffrey Yurfest of Coldwell Banker Commercial Atlantic International. The misrepresentation and inducement are described in The Coldwell Banker Commercial's Agent's affidavit at ¶4 as follows: Appellants, during the negotiations with Respondent, expressed their concern through Vicki Smith about the street improvements at issue in the above referenced action. Thereafter, I contacted the Listing Agent who ultimately represented to me that the project would end in November 2008 and that they would offer 3 months rent while the construction was being completed. (R. pp. 164-165)

This representation was false. The entire set of circumstances was described in a letter referenced in ¶5 of the Affidavit from Coldwell Banker Commercial's agent to Appellant Vicki Smith as follows:

Per our conversation this is my account of the construction timeline. Prior to signing the lease at 163 King St., you had asked me to inquire about the end date for the Streetscape construction on lower King Street. As I did not know. I had asked the listing agent Kit Regnery from Batten and Moore, if he knew, as you had reservations about signing the lease during the construction project.

Kit told me that the streetscape construction would end in November 2008, prior to Thanksgiving, the peak Christmas buying period. He stated that the Landlord would offer you free rent in September, October, and November, while the construction was being completed. You said that this would be acceptable and you signed the lease.

When we spoke about this matter back in the May or June 2009, you indicated that you were upset because the Streetscape was still on-going and that the city was indicating the completion date was originally August 2009, but they were currently running a month behind. You asked me to find out from Batten and Moore if the information they provided you back in September was correct, and if so, where did they obtain this information. Kit stated to me that he was told by the City of Charleston that the construction would be completed in November 2008.

I hope this clears up any questions you might have about the circumstances surrounding the information I provided about the

completion date of the streetscape and how I obtained that information.
Regards, Jeff Yurfest . (R. p. 166)

Accordingly, the Court's Order granting summary judgment in the sum of \$49,361.89 is based upon a lease that was induced by a misrepresentation and so the Court should reconsider the Motion and vacate the Order of Judgment.

**The Prosecution of the Instant Action by Respondent
Is a Breach of Contract by Failure to First Satisfy a Condition Precedent**

"Approximately ten days before the end of the three month period (May 22, 09) the Landlord (or it's Agent) will meet with the tenant (or tenant's Agent) and determine if an additional period of reduced rent is called for." (Emphasis added by underlining). (R. p. 161) The foregoing quote is a part of the language to the addendum to the lease signed by Respondent on February 25, 2009 and tenant Appellant February 27, 2009. This meeting never took place. This is a condition precedent, and it was not waived. Quite to the contrary, the Appellants responded to the Respondent's demand letter offering to meet. The entire response is set out herein:

Dear Mrs. Livingston:

I am in receipt of your unsigned letter advising of the 10 days you have given me to pay the late rent at 163 King St., or be evicted. Your reputation is that of a reasonable person, so I believed after we talked 10 days ago, that we were in agreement that I would pay you what I could toward the rent until the situation improved on King Street. All of the landlords are working with their tenants to try to help them through this downturn in business and traffic. I told you in our telephone conversation that I would try to pay you something by the end of the month. I mailed you \$1,000.00 on May 1, and I tried to call your cell phone number three times that day to discuss this with you.

We have sold less than \$100.00 in the last seven days and therefore I can tell you now, that I will be unable to pay the \$4,082.74 you have requested in the next 8 days for the remainder of April and the total of the May rent. It was our hope that we would get the opportunity to benefit from Spoleto,

but this probably will not matter, as we got no benefit from "Southeastern Wildlife", the "Wine and Cheese Festival", the "Antiques Show", and the "House and Garden Tours". This is not just our business that has suffered. We have spoken with all the merchants on our block and they are all experiencing the same lack of sales and traffic. You -may not be aware, but the 24/7 cable news sources are continuing to report that things may have turned the corner in the economy, but unemployment and slumping sales may continue for several months to come. This has created a fear factor among the buying public and people are just not spending on anything other than essentials.

We currently have 4 vacant buildings in our block from Clifford St. to Queen St., and Kennington-Stobart Gallery is closing on May 23. If you evict us that would total 6 vacant buildings in that block, it would seem reasonable to assume that you would prefer to have the building occupied and work with us until the situation improves, rather than join the ranks of all the other vacated landlords. While speaking with the other shop owners it has come to our attention that most of the shop owners are paying a square foot rate that is half of what we agreed to in our lease. If you doubt this I would invite you come down and observe the rental rates that are posted in the windows of the vacant buildings. At the time we

signed the lease we were told that we had the lowest lease on the block. We realize now how stupid we were for putting any trust in the real estate agents.

When we were negotiating the lease with your agent, we asked how long the construction would last. We were told that it would be finished in December and therefore you were willing to grant us an extra two months free rent to compensate for the construction. This was a material misrepresentation of our question as to when the construction would be completed. We later found out from other shop owners, after we had signed the lease, that construction would not be completed until August or September. With the exception of the moratorium on construction during part of November and the whole of December we have had construction equipment and trucks blocking our entrance daily and impeding foot traffic. For six weeks in February and March there were no sidewalks and the ramps that were put down had construction vehicles and equipment parked in front of them so close that pedestrians found it difficult to enter the ramp. The construction people would put up walkways with pylons and tape to create walking areas in the street in lieu of the sidewalks, and then they would block them by parking their vehicles in the taped off area, Yesterday, we had a huge SCE&G truck and trailer parked in front of our store and they were pulling underground wiring under the sidewalks, so the sidewalks were impassable once again, Until the traffic returns to lower King St. and the American public begins

buying once again, merchants cannot pay the rents that were based on the business generated in prior years. We have had to sell off stocks and other assets to keep this business going. Banks will not loan money for any reason. Now you want to evict us when we are trying to work through this issue. If you would would like to sit down and talk about this we would be happy to meet with you. You can call me at the shop at 577 6220.

Yours very truly,

Vicki W. Smith . (R. pp. 162-163)

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E. 2d 802 (805) (Ct.App.2005) Accordingly, the Courts grant of summary judgment should be vacated and the action for damages dismissed as premature since Respondent failed to meet with Appellants as she agreed in the addendum to the lease . (R. p. 158) which was a condition precedent to further proceedings.

Respondent Failed to Mitigate Damages

Instead of meeting, . (R. p. 158) the Respondent's response was a writ of ejectment . (R. p. 46) which ultimately resulted in the vacation of the premises by the Appellants and an order of ejectment. The Respondent's persistence on proceeding without meeting in breach of the express provision of the Lease Addendum she signed February 25, 2010 to discuss mitigation of the damages is also arguably a breach of the Landlord's duty to mitigate damages under basic South Carolina law.

ERVIN'S REQUESTS TO CHARGE-CIVIL GENERAL CONTRACT § 22-7

Damages — mitigation states the law as:

If you find from a preponderance of the evidence that a contract existed between the plaintiff and the defendant, and that the defendant breached that contract, then you must decide whether the plaintiff took reasonable actions to reduce or minimize any damages it may have incurred. 25 C. J. S. *Damages* § 33 (1966); *Rathborne, Hair & Ridgeway Co. v. Williams*, 59 F. Supp. 1 (E. D. S. C. 1945).

A party suffering damages has a duty to exercise reasonable care and diligence to minimize its damages. *Du Bose v. Bultman*, 215 S. C. 468, 56 S. E. 2d 95 (1949); *Fewell v. Catawba Power Co.*, 102 S. C. 452, 86 S. E. 947 (1915) (one seeking to hold another liable for damages must use reasonable efforts to mitigate such damages).

No recovery may be had for losses that a person might have prevented by reasonable efforts and expenditures. 25 C. J. S. *Damages* § 33 (1966); *Rathborne, Hair & Ridgeway Co. v. Williams*, 59 F. Supp. 1 (E. D. S. C. 1945).

The rationale explaining the failure to mitigate damages was described by

Appellants in their letter to Respondent dated May 6, 2009 as follows:

We currently have 4 vacant buildings in our block from Clifford St. to Queen St., and Kennington-Stobart Gallery is closing on May 23. If you evict us that would total 6 vacant buildings in that block, it would seem reasonable to assume that you would prefer to have the building occupied and work with us until the situation improves, rather than join the ranks of all the other vacated landlords. While speaking with the other shop owners it has come to our attention that most of the shop owners are paying a square foot rate that is half of what we agreed to in our lease. If you doubt this I would invite you come down and observe the rental rates that are posted in the windows of the vacant buildings. (R. p. 162-163)

Appellants argue that by failing to meet and discuss terms which would allow the Appellants to stay and continue to pay at least some rents until a replacement tenant could be found and instead further proceeding despite breaching the condition precedent of a meeting in order to immediately obtain an order evicting Danube Exports, LLC from her premises, Respondent has failed to have any income at all

from these Appellants that she could otherwise have had. Accordingly, Appellants argue Respondent has failed to mitigate her damages.

The Reasonableness of Respondent's Actions to Mitigate Damages Is a Question of Fact So That the Courts Grant of Summary Judgment Inappropriate

In ERVIN'S REQUESTS TO CHARGE-CIVIL GENERAL CONTRACT § 22-7 Damages — mitigation(Supplement) Judge Ervin states that the reasonableness of a party's actions to mitigate damages is a question of fact. "*Cisson Construction, Inc. v. Reynolds & Assoc., Inc* 311 S. C. 499, 429 S. E. 2d 847 (Ct. App. 1993) (the duty to mitigate losses applies to contracts; the reasonableness of a party's actions to mitigate damages is a question of fact)."

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c). " When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in a light most favorable to the nonmoving party." *Fleming v. Rose*, 350 S.C. 488, 493 , 567 S.E. 2d 857, 860(2002). In evaluating the Respondent's failure to mitigate her damages, the evidence and all reasonable inferences must be viewed in a light most favorable to the nonmoving party. Appellants argue that when that it is done then a reasonable juror could find that the Respondent failed to mitigate her damages . Accordingly Summary Judgment is inappropriate in this case and the Judgment should be reversed.

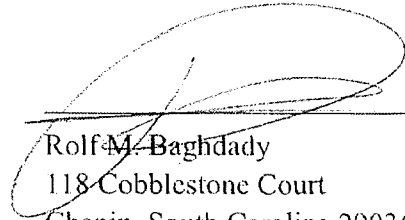
CONCLUSION

Because of the Circuit Court's error, this Court should reverse the judgments

of the Circuit Court and remand the case for further proceedings on the pleadings to determine the amount of rent and/or damages on the counterclaim that are due.

Respectfully submitted,

January 2, 2011



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Attorney for Appellants

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Elizabeth Livingston, Respondent,

v.

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

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2012-UP-037
Heard December 5, 2011 – Filed January 25, 2012

DISMISSED

Rolf Mouin Baghdady, of Chapin, for Appellants.

Timothy James Wood Muller, of Charleston, for
Respondent.

PER CURIAM: Danube Valley Exports, LLC, Vicki W. Smith, and William Smith (collectively Danube Valley) appeal the circuit court's order requiring Danube Valley to vacate its leased premises and pay past due rent to the owner of the leased premises, Elizabeth Livingston (Livingston). Danube Valley claims the circuit court erroneously applied an ejectment statute when it ordered vacation of the premises and payment of rent because Danube Valley never objected to vacating the premises, only to the amount of rent due.

Because Danube Valley conceded during oral arguments the circuit court's order is interlocutory, we dismiss pursuant to the following authorities: Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) ("An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or part of some cause of action or defense.'") (internal citation omitted); Brown v. Cnty. of Berkeley, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) ("It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right.") (internal citation omitted); Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("[Interlocutory] orders affecting a substantial right, 'discontinue an action, prevent an appeal, grant or refuse a new trial or strike out an action or defense.'") (internal citation omitted); Bowaters Carolina Corp. v. Carolina Pipeline Co., 259 S.C. 500, 505, 193 S.E.2d 129, 132 (1972) (holding an appellate court need not pursue an issue conceded during oral arguments); Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) ("[A]n order which does not put a final end to the case, nor establish any principle which will finally effect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed.") (internal citation omitted).

DISMISSED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
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

Appellants.

PETITION FOR REHEARING

Appellants petition for rehearing the Court's decision filed January 25, 2012 dismissing the appeal in the instant case for rehearing in accordance with SCAR 221 and 240. Appellants argue that there was no "concession" by any Appellant that the appeal was "interlocutory". Appellants assert the order of the Honorable Kristi Lea Harrington dated September 14, 2009 filed September 18, 2009¹ (R. p. 44) 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,

¹The description typed on the top of page 44 of the record incorrectly reflects 2010 instead of 2009 as appears on the document for the execution date and filing date.

RECEIVED

FEB 09 2012

SC Court of Appeals

§ 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:

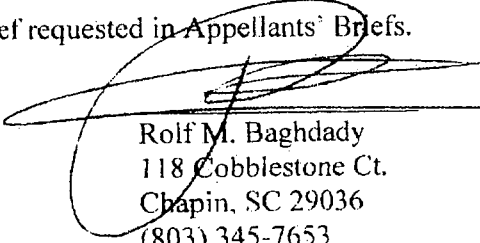
(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if 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:

Appellants argue that they have followed, with respect to the interlocutory intermediate order of the Honorable Kristi Lea Harrington dated September 14, 2009 filed September 18, 2009 (R. p. 44) the course 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. *McCrady v. Jones*, (S. C.) 15 S.E. Rep. 430, and cases there cited.

Wherefore, Appellants pray that the Court of Appeals will grant this petition for rehearing on the merits and strike and/or reverse the decision filed January 25, 2012 dismissing the appeal because "Danube conceded during oral Arguments the Circuit Court's order is interlocutory" and decide the appeal on its merits and grant the relief requested in Appellants' Briefs.

February 8, 2012



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Attorney for Appellants

The South Carolina Court of Appeals

Elizabeth Livingston,

Respondent,

v.

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

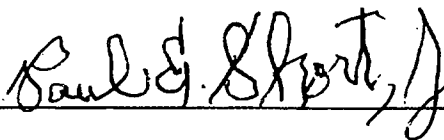
Appellants.

The Honorable Kristi Lea Harrington
Charleston County
Trial Court Case No. 2009-CP-10-03608

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

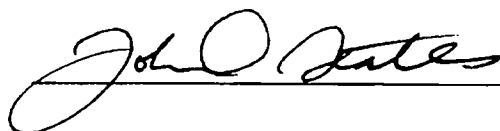
It is, therefore, ordered that the Petition for Rehearing be denied.



J. Short



J. Williams



J. Geathers

Columbia, South Carolina

cc: Rolf Mouin Baghdady, Esquire
Timothy James Wood Muller, Esquire

FILED
March 2, 2012