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|-------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA | ) |                               |
|                         | ) | IN THE COURT OF COMMON PLEAS  |
| COUNTY OF LEXINGTON     | ) |                               |
|                         | ) | Case Number: 2016-CP-32-01968 |
| BOB RICE REALTY, INC.,  | ) |                               |
|                         | ) |                               |
| Plaintiff-Respondent,   | ) |                               |
|                         | ) |                               |
| -vs-                    | ) | ORDER FOR TEMPORARY           |
|                         | ) | RESTRAINING ORDER UNDER       |
|                         | ) | RULE 65 (b), SCRCP            |
| GERALD J. NAGY,         | ) |                               |
|                         | ) |                               |
| Defendant-Appellant.    | ) |                               |
| _____                   | ) |                               |

The appellant, Mr. Gerald J. Nagy, who is self-represented, filed a motion seeking a temporary restraining order, without notice, under Rule 65(b), SCRCP. An affidavit in support of the motion was also filed, as well as attachments. Mr. Nagy was served with an eviction notice yesterday at 2:50 p.m. which ordered him to vacate the premises by 2:50 p.m. today. The gist of his motion is that he believes that a new action for eviction was required, that the summary court had no authority to order this eviction, and that the present eviction notice does not give him proper time to challenge the action or vacate the premises. The court determines, on a temporary basis: 1) that it has jurisdiction to issue a temporary injunction under Rule 65, SCRCP; 2) that the appellant has established entitlement to temporary injunctive relief, without notice; and, 3) that a hearing on this matter shall be held at 1:30 p.m. on Friday, February 17, 2017, at the Marc H. Westbrook/Lexington County Judicial Center, or as soon thereafter as the matter may be heard.

*WPK*  
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## BACKGROUND

Mr. Nagy is an occupant of property owned by the respondent, Bob Rice Realty, Inc. (the landlord). From the documents that have been filed, this court cannot definitively state whether this is residential property or commercial property, but the appeal filed with this court refers to the property as a dwelling.

The appellant's affidavit recites that the landlord served a notice of eviction on April 4, 2016, to which the appellant filed an Answer and Counterclaim. The appeal filed in circuit court states that a lease was in effect for a period of one year, which was automatically renewed, unless written notice was given. It is unclear to this court whether the appellant is seeking to remain on the property subject to the stay, or as a tenant carrying over, or as having a new one-year lease, though it appears that he only wants to remain on the property temporarily.

*WHL*  
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The summary court judge heard the matter on June 2, 2016, and an eviction was ordered. Mr. Nagy appealed to the circuit court. The matter was heard by The Honorable Donald B. Hocker on September 20, 2016.

Judge Hocker entered an order on the same date as the hearing. It states that the landlord did not appear for the hearing. Judge Hocker ruled that the summary court judge's ruling was reversed "to the extent of allowing the Appellant to remain on the property until December 31, 2016 in accordance with the subject lease." Judge Hocker also awarded a monetary judgment of \$150 to the appellant for court costs.

Mr. Nagy appealed Judge Hocker's order to the South Carolina Court of Appeals. The notice of appeal reads that Mr. Nagy is appealing "the monetary damage award . . . ." Based on that language, it appears that Mr. Nagy has appealed the determination related

to the damage award (the counterclaim), not the eviction. However, the circuit court does not have anything before it related to the materials filed with the Court of Appeals, except the notice of appeal. The court is advised that the matter is currently pending before the Court of Appeals.

There is nothing in the record presently before this court that indicates whether the circuit judge entered any provision for bond. Obviously, the circuit judge disallowed the eviction and provided that Mr. Nagy could remain on the property until the end of 2016 pursuant to the terms of a lease. The index on CMS has a link to a document entered by the Magistrate on June 17, 2016, which provides that the appellant must pay monthly rental of \$900, staying the eviction.

The attachments to the affidavit in support of this motion for temporary restraining order also contain a copy of a letter from the attorney for the landlord, written to Judge Hocker on February 3, 2017, seeking clarification of Judge Hocker's order, at the request of the summary court judge. The letter recites that the Magistrate, Judge Dooley, asked the attorney to seek Judge Hocker's position on whether the Magistrate could order eviction or whether a new action had to be filed.

Judge Hocker's administrative assistant replied that Judge Hocker felt that he did not have jurisdiction. The letter from Judge Hocker's office is dated February 7, 2017.

Both the letter from the landlord's counsel, as well as the letter from Judge Hocker's office reflect that a copy was sent to Mr. Nagy. The motion recites that Mr. Nagy had no advance notice of whatever proceeding was held by Judge Dooley in making the decision to order the most recent eviction notice.

The packet from the appellant indicates that he has paid rent to the landlord for the months of January and February, 2017, which he believes should be sufficient for any bond required for a temporary injunction. The packet also contains an assertion that it is the landlord's position that he has a purchaser lined up to buy the property, but that the closing cannot go forward as long as there are any tenants on the premises. If the temporary restraining order is extended into an injunction after the upcoming hearing, the circuit judge will have to set the amount of bond.

### DISCUSSION

The first issue is whether this court has any jurisdiction over the pending motion. Normally, when an appeal is filed from a ruling of the circuit court, the circuit court is divested of jurisdiction. Rule 205, SCACR, reads:

#### **RULE 205 EFFECT OF APPEAL**

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

In addition, Rule 241, SCACR, reads, in applicable part:

#### **RULE 241 STAY AND SUPERSEDEAS IN CIVIL ACTIONS**

**(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or

administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

**(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is: . . .

**(10)** Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.

. . .

**(c) Supersedeas or Lifting of Automatic Stay.**

**(1)** After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.

**(2)** In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

**(3)** The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

**(4)** If an order is issued pursuant to Rule 241(c)(1), the terms of that order continue in effect during the pendency of the appeal unless modified or revoked by the lower court, the administrative tribunal or the appellate court or judge or justice of the appellate court which issued it, or by a

superior court. The granting of any relief pursuant to this Rule shall not be construed to affect the validity of the judgment, order, decree, decision and any liens until the judgment, order, decree or decision is reversed or modified by the appellate court.

**(d) Procedure for Obtaining Lift of Stay or Supersedeas.**

(1) Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

(2) After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order. The individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.

(3) A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service. . . .

The issue before this court relates to eviction. It seems to fall within the exception for ejection cited above.

Realizing that the opposing side has not had an opportunity to present its argument and the court has not reviewed the entire record, the appeal that is pending before the South Carolina Court of Appeals seems to relate to the

damages portion of Judge Hocker's ruling. Therefore, as a temporary determination, it also appears that the section of Rule 205, is applicable, which provides, "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 241(a) also has language which provides, "The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."

If the automatic stay is in effect, it appears on a temporary basis that this court can act, nonetheless, to lift the stay under Rule 241 as it relates to the subject matter contained in the pending motion. There are exigent circumstances due to the appellant being ordered to vacate the premises within 24 hours of the notice given. Based on the record currently before it, the court finds that the granting of temporary relief is necessary to maintain the status quo, to give the proper due process rights of notice and an opportunity to be heard, and to give the appellant the opportunity to show why he should not be displaced and his belongings put into the street. Further, the documents submitted in support of the motion state that Mr. Nagy suffers from a heart condition and is physically unable to comply with eviction based on notice of only 24 hours.

As for Rule 65, SCRCF, a party seeking a temporary restraining order, without notice, is required to meet the requirements stated below. Rule 65, SCRCF, reads, in applicable part:

**RULE 65**  
**INJUNCTIONS; MANDAMUS, HABEAS CORPUS,**  
**AND OTHER REMEDIAL WRITS**

**(a) Temporary Injunction; Notice.** No temporary injunction shall be issued without notice to the adverse party.

**(b) Temporary Restraining Order; Notice; Hearing; Duration.** No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall be served, together with a summons and complaint in the event no summons and complaint have previously been served in the action, upon the adverse party in accordance with the provisions of Rule 4; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a temporary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

**(c) Security.** Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof. A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of court as his

agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of court who shall forthwith mail copies to the persons giving the security if their addresses are known.

**(d) Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

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An injunction is a drastic remedy issued by a court in its discretion to prevent irreparable harm to the appellant. Injunctive relief is an extreme remedy and should be cautiously applied. *Scratch Golf Co. v. Dunes Residential Golf Props, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004); *LeFurgy v. Long Cove Club Owners Assoc. Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994). QUIA

Traditionally, the sole purpose of an injunction is to preserve the *status quo* and is, therefore, prohibitory. It generally is used to prohibit a defendant from acting to change the status quo. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); *Mailsources, LLC v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App. 2003).

As cited in Rule 65 above, to receive a temporary restraining order, without notice, the appellant must clearly show specific facts by affidavit that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. The court finds that the appellant has met that burden. He has

recited in an affidavit that he was given no notice of any subsequent eviction hearing, that he was served with a notice that required him to vacate within 24 hours, that he is unable to meet that deadline, and that the effect of not meeting that deadline subjects him to the threat of forcible removal and imminent displacement of his personal property. He has recited his health and the short time frame as reasonable bases for not being able to comply. He has also shown that he has arguments in opposition to the eviction that have merit and should be considered.

In addition to considering the language of Rule 65 relating to temporary restraining orders, without notice, the court has also considered the general rules about issuing any type of injunctive relief, whether mandatory or prohibitory. A party seeking such relief must allege facts sufficient to constitute a cause of action for injunction and also show that the injunction is necessary to protect his legal rights. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App. 2002). Only when a party's "legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected" is the drastic remedy of an injunction appropriate. *LeFurgy*, 313 S.C. at 558, 443 S.E.2d at 578. To obtain a temporary injunction to preserve a party's legal rights pending the resolution of the litigation, a plaintiff must demonstrate (1) that he would suffer irreparable harm if the injunction is not granted; (2) that he will likely succeed on the merits of the underlying litigation; and (3) that he has no adequate remedy at law. *See Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010); *Levine v. Spartanburg Reg'l Serv. Dist. Inc.*, 367 S.C. 458, 464, 626 S.E.2d 38, 41 (Ct. App. 2006); *County of Richland v. Simpkins*, 346 S.C. at 669, 560 S.E.2d at 904.

Injunctions are equitable in nature and, therefore, are only “granted as a matter of sound judicial discretion, not as a matter of legal right.” *Johnson v. Phillips*, 315 S.C. at 417, 433 S.E.2d at 901. Moreover, “[b]ecause the remedy of injunction is drastic, the plaintiff has the burden of proving a clear case, reasonably free from doubt.” *Mims vs. Yarborough*, 343 F. Supp. 1146, 1161 (D.S.C. 1971), affd, 461 F.2d 1266 (4th Cir. 1972). Even then, injunctive relief should only be granted “when necessary to prevent great and irreparable injury.” *Id.* (quoting 42 Am.Jur.2d, Injunctions, Section 26).

Realizing that this action is for a temporary restraining order, without notice, the court has evaluated the three requirements for any type of injunctive relief. For purposes of temporary relief, the court finds that the appellant has met all three, though it realizes that the determination might change after a judge has an opportunity to hear from the opposing party and consider a more complete record. At this stage, based on this record, Mr. Nagy has sufficiently demonstrated that he will suffer irreparable harm by being evicted from this property and by facing the imminent threat of forcible entry and forcible removal of his personal property. He has demonstrated a likelihood of success on the merits in that there is a strong argument that a separate proceeding was required or that steps had to be taken, with notice to Mr. Nagy, to remove the stays that are arguably in place. He has demonstrated no adequate remedy at law available to him that would properly compensate him after the fact or preserve his rights in the short time frame that has been afforded to him. He has established that he has not been given sufficient time in this most recent notice in which to vacate the premises and secure his personal property. The court realizes that he was included in the correspondence and has known of the

December 21, 2016 provision for well more than the 24 hours provided in this most recent notice. But, those were not eviction orders.

As for the matter of bond, the court understands that the appellant has recited that he paid \$1,800 for January and February rent, though it is assumed that those payments were not negotiated, at least as to the February payment. The court requires bond to be paid by certified funds or cash into the Clerk of Court of Lexington County's account in the amount of \$1,800.


THEREFORE, IT IS ORDERED that an emergency temporary restraining order is hereby issued so that the eviction notice given to the appellant on February 15, 2017, requiring his eviction within 24 hours is not to be executed until further order of this court (or a higher court).

IT IS ORDERED that a hearing shall be held at 1:30 p.m. on Friday, February 17, 2017, or as soon thereafter as the matter may be heard, at the Marc H. Westbrook/Lexington County Judicial Center, located at 205 E. Main Street, Lexington, South Carolina, at which time the parties may present their cases for issuance of further injunctive relief or for denying such relief and allowing the eviction to proceed.

IT IS ORDERED that this temporary restraining order shall expire within 10 days from its issuance or at such time prior to that deadline as an order is entered pursuant to the hearing to be held on February 17, 2017.

IT IS ORDERED that this temporary restraining order shall not be effective until the appellant has placed into the account of the Lexington County Clerk of Court the amount of \$1,800 as bond, in certified funds or cash.

AND IT IS SO ORDERED.

  
William P. Keesley, Judge

Issued at 1:12 p.m.,  
February 16, 2017

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