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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals  
Case No. 2020-001626

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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Appellate Case No. 2020-001626

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Exquis Event Center,

Appellant,

v.

BRE Retail NP Festival Centre,

Respondent.

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INITIAL BRIEF OF RESPONDENT

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## ARGUMENT

### I. THE APPEAL IS MOOT BECAUSE APPELLANT DID NOT CONTEST THE EJECTMENT AND IS NO LONGER IN POSSESSION OF THE PREMISES.

“A case is moot ‘when judgment, if rendered, will have no practical legal effect upon existing controversy.’” *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 642, 837 S.E.2d 485, 487 (2020), *reh’g denied* (Jan. 22, 2020) (citing *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

In *Skydive*, the owner of a local airport (Horry County), brought an ejectment action against its tenant, a skydiving company, asserting that the lease of a hangar at the airport had ended. The Magistrate granted the eviction, and tenant appealed. The Court of Appeals determined that the issue of whether the tenant was entitled to possession was moot because the tenant had not been in possession of the hangar for more than three years. *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 424 S.C. 298, 818 S.E.2d 224 (Ct. App. 2018). On further appeal to the Supreme Court of South Carolina, it was held that the tenant’s lack of possession did not render the appeal moot because the tenant “repeatedly contested all rulings by the courts in an obvious attempt to remain in the bird hangar.” *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 643, 837 S.E.2d 485, 487 (2020), *reh’g denied* (Jan. 22, 2020). In so holding, a clear distinction was drawn under South Carolina law between a tenant who voluntarily vacates the premises, and a tenant who contests the eviction at each available opportunity. *Id.* at 642, 837 S.E.2d at 487 (“The key fact in [*Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951)] that made the tenant’s appeal moot was the tenant vacated the premises voluntarily.”).

Here, it is undisputed that after the Magistrate denied Appellant’s preliminary motion to dismiss the ejectment action pursuant to Rule 12(b)(8), Appellant did not object to or otherwise oppose the eviction action at the Magistrate’s bench trial on the merits. *See* Application for

Ejectment Verdict Form (stating that tenant had “no objection to ejectment”) (contained within Magistrate’s Return).

Furthermore, Appellant was physically evicted from the premises on or about December 15, 2020, and is no longer in possession of the premises. *See* Writ of Ejectment (filed with the COA on 12/16/2020); *see also* Affidavit of David Carpio (filed with the COA on 12/17/2020).

As such, this case is analogous to *Berry*, in that while Appellant may not have vacated the premises voluntarily after the Writ of Ejectment was issued and served by the Constable, Appellant did not object to or otherwise contest the ejectment action at the bench trial conducted by the Magistrate, which was the most critical component of the case. Thus, under *Skydive* and *Berry*, discussed above, Appellant’s appeal should be dismissed as moot.

II. MAGISTRATES HAVE CONCURRENT CIVIL JURISDICTION IN MATTERS BETWEEN LANDLORD AND TENANT, AND THEREFORE RESPONDENT WAS FREE TO BRING THE EVICTION ACTION IN MAGISTRATE’S COURT AND TO FILE A SEPARATE DAMAGES ACTION IN THE COURT OF COMMON PLEAS.

Magistrates have concurrent civil jurisdiction “in all matters between landlord and tenant”. S.C. Code § 23-3-10 (10). Thus, Respondent was free to bring an eviction action before the Magistrate or in the Court of Common Pleas, at Respondent’s election.

However, the Magistrate only enjoys concurrent civil jurisdiction in an action for damages that does not exceed \$7,500. Thus, any action seeking monetary relief in excess of \$7,500 must be brought in the Court of Common Pleas.

In the instant case, the Application for Ejectment alleges that Appellant owes Respondent “the sum of at least \$75,762.04”. This amount far exceeds the Magistrate’s jurisdictional limit of \$7,500. Accordingly, Respondent sought judgment “for possession only” in the ejectment action pending before the Magistrate. *See* Application for Ejectment Verdict Form (stating that

Plaintiff/Landlord sought “judgment for possession only”) (contained within Magistrate’s Return).

Respondent then filed a separate action for breach of contract in the Court of Common Pleas, after the eviction action was filed, seeking the recovery of monetary damages based upon Appellant’s default of the Lease. As previously discussed, the damages sought far exceeded the Magistrate’s jurisdictional limit for monetary relief.

The bottom line is that there is nothing that *required* Respondent to combine its separate claims for ejectment and money damages into one action, or to otherwise sue for eviction in the Court of Common Pleas.

III. THE MAGISTRATE PROPERLY DENIED APPELLANT’S MOTION PURSUANT TO RULE 12(b)(8) BECAUSE THE EVICTION ACTION AND THE DAMAGES ACTION DO NOT CONSTITUTE THE SAME “CLAIM”.

Appellant relies upon *Unisys Corp. v. S.C. Budget & Control Bd.* in arguing that Rule 12(b)(8) required dismissal of the eviction action. Appellant’s argument is misguided because *Unisys* is easily distinguishable from the instant case.

*Unisys* involved a dispute between a private party and the State of South Carolina which arose under the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11–35–4230. 346 S.C. 158, 164, 551 S.E.2d 263, 267 (2001). For that reason alone, the case is wholly inapposite to the instant action. Nevertheless, the trial judge in *Unisys* determined that the Procurement Code vested the Chief Procurement Officer and the Procurement Review Panel with exclusive original jurisdiction over the parties’ dispute and that the Circuit Court therefore lacked jurisdiction over the matter. *Id.* at 168, 551 S.E.2d at 269. On appeal, the Court of Appeals agreed, and affirmed the trial judge’s ruling. Thus, the analysis in *Unisys* did not turn on whether the competing actions involved the same “claim” under Rule 12(b)(8), but was

instead decided on the basis of a jurisdictional statute with no application to the present case. Accordingly, *Unisys* is wholly inapposite and does not stand as binding or even persuasive precedent for the instant case.

Here, the Magistrate determined that the “parties and subject matter were identical” but, critically, did not constitute “the same claim”, as they must in order for Rule 12(b)(8) to apply. *See* Magistrate’s Return; *see also Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105, 674 S.E.2d 524, 531 (Ct. App. 2009) (“In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim.”) (emphasis added).

Appellant admits in her brief that Rule 12(b)(8) has been “narrowly applied”. *See* Appellant’s Brief, p. 7; *see also Capital City*, 382 S.C. at 106, 674 S.E.2d at 532 (“Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).”).

In *Capital City*, the Court of Appeals determined that dismissal under Rule 12(b)(8) was improper. The court stated that while “the administrative claim may have some relationship or impact upon the circuit court action, we also recognize that the administrative proceeding and the circuit court action are fundamentally and structurally different from each other.” *Id.* The same holds true here when comparing the Application for Ejectment filed before the Magistrate with the Common Pleas action for breach of contract damages. The eviction action sought judgment for possession only, whereas the Common Pleas action sought judgment for money damages in excess of \$672,633.69. The nature of the two claims, and the relief requested, is fundamentally and completely different, and Rule 12(b)(8) is not implicated.

Notably, there are no reported appellate decisions in South Carolina holding that an eviction action before the Magistrate and a Common Pleas action for breach of contract damages cannot co-exist or that one action is a proper subject for dismissal in light of the pendency of the other. In this respect, Appellant makes a bald, unsupported argument that urges this Court to rewrite South Carolina law, in contravention of existing statutory law regarding the Magistrate's concurrent civil jurisdiction. This Court should not indulge Appellant in this regard. The Magistrate properly concluded that Appellant's motion to dismiss pursuant to Rule 12(b)(8) should be denied.

#### IV. THERE WAS NO VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS.

As a secondary ground for appeal, Appellant argues that her due process rights were somehow violated by not receiving a formal hearing following the dismissal of her appeal and the lifting of the stay on execution of the ejectment for failure to comply with the terms of the Appeal Bond. Notably, Appellant does not dispute that she failed to comply with the express terms of the Appeal Bond. Nor does Appellant challenge the Affidavit submitted by Respondent on December 8, 2020, attesting to the amount of money Respondent received and the fact that the sum did not constitute the full amount due pursuant to the Appeal Bond. Appellant also admits that she "did not dispute the amount of the rent" that was stated in the appeal bond, including the amount of arrears or the monthly rent. *See* Appellant's Initial Brief, p. 4. Thus, in effect, Appellant is appealing an alleged wrong that was never actually committed.

Appellant does not (and cannot) point to any statute or other authority purporting to afford or guaranty her a right to notice or opportunity to be heard before her appeal was dismissed for non-compliance with the requirements of the Appeal Bond. Moreover, the record confirms that Appellant filed a Motion to Alter or Amend the Order dismissing her appeal, but

after careful consideration by the lower court, that motion was denied. Had there been a glaring omission or other shortcoming in the Order dismissing the appeal, or the factual/procedural history upon which it was based, then surely the Court of Common Pleas would have at least granted oral argument or ordered supplemental briefing before ruling on the Motion to Alter or Amend.

Appellant also sought the issuance of a temporary restraining order (“TRO”) to prevent the eviction from going forward, which was likewise denied, and then Appellant even filed a motion to reconsider the denial of the TRO, which was denied. Thus, the facts reveal that Appellant has received a *substantial* amount of process following the dismissal of her appeal. Unfortunately for Appellant, the law is simply not on her side on these issues, and there is no basis to overturn the dismissal of the appeal.

“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution.” *Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). “Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest.” *Id.* “Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 172, 656 S.E.2d at 350. As in *Kurschner*, Appellant was not entitled to “the full gamut of rules and procedures” to which claims she was entitled, given the other procedural safeguards that were available to her and that were in fact provided. *Id.*

The bottom line is that there is no set of facts that would have changed the outcome of the lower courts’ decision to dismiss her appeal, other than Appellant’s actual compliance with the requirements of the Appeal Bond. Appellant would again have this Court rewrite South Carolina

law in order to vindicate her position, but in so doing, is essentially requesting that this Court issue an advisory opinion, in that, even if she prevails, her argument regarding the Appellate Bond would be estopped and/or deemed to have been waived in light of her failure to contest the amounts required to be paid by the Appeal Bond before it was issued.

Appellant clearly received the benefits of more than adequate procedural safeguards through the filing of her Motion to Alter/Amend and her request for a TRO, and therefore she cannot be said to have been deprived of due process.

### CONCLUSION

For all of the foregoing reasons, and upon all of the foregoing authorities, this Court should determine (1) that the Magistrate did not err in denying Appellant's motion to dismiss the eviction action pursuant to Rule 12(b)(80); and (2) that Appellant was not denied of any due process rights in connection with (a) the dismissal of her appeal of the judgment for possession or (b) the lifting of the stay of the execution/ejectment following Appellant's documented non-compliance with the Appeal Bond. Accordingly, the rulings of the lower courts should be AFFIRMED.

Respectfully submitted, this the 27<sup>th</sup> day of April, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing INITIAL BRIEF OF RESPONDENT was electronically filed by emailing a copy thereof to [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org). I further hereby certify that the foregoing document was served on all counsel of record in this action by emailing a copy to [tristan@shafferlawsc.com](mailto:tristan@shafferlawsc.com).

This the 27<sup>th</sup> day of April, 2021.

/s/ Christian H. Staples

Christian H. Staples

Shumaker, Loop & Kendrick, LLP