

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT IN AND  
FOR ORANGE COUNTY, FLORIDA

HOLLY D. MORGAN and  
DANIEL E. SPRINGEN,

APPELLATE CASE NO: 2015-CA-729-O  
Lower Case No. 2014-CC-596-O

Petitioners,

v.

CHRISTOPHER SCOTT HEWITT,  
As Personal Representative of the  
Estate of Wilbur Hewitt, Deceased.

Respondent.

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Appeal from the County Court  
for Orange County, Florida  
Adam McGinnis, County Court Judge

Scott A. Smothers, Esq.  
Attorney for Petitioners

Allan C. Draves, Esq.  
Attorney for Respondent

Before BLACKWELL, SHEA, G. ADAMS, JJ.

**PER CURIAM.**

**ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Petitioners seek certiorari review of a non-final order of possession removing them from a house they claim to have an ownership interest in under a lease-to-own contract originally executed with the now-deceased owner of the house. To obtain relief on a petition for writ of certiorari, petitioners must demonstrate that the order of the lower court (1) departs from the essential requirements of law; (2) will cause material injury through subsequent proceedings in the case; and (3) causes irreparable harm. *Wolf Creek*

*Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th DCA 2006). The reviewing court “should examine the seriousness of the error, if any, and use its discretion to correct an error only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.” *Id.* (Internal citation omitted). Also, *State Farm Florida Ins. Co. v. Buitrago*, 100 So. 3d 85, 87 (Fla. 2d DCA 2012).

Acting under the residential landlord-tenant statute, respondent, who is the personal representative of the deceased’s estate, filed an action in county court to evict petitioners. Petitioners filed a motion to dismiss the action, alleging that they had lived in the house for more than five years under a lease with a purchase option; they claimed to have spent considerable sums on improving the property and alleged that they paid \$6000 to the deceased’s son as a deposit to exercise their option to buy. To document their claim, they referenced the lease/purchase contract which had already been filed as an attachment to respondent’s eviction complaint. They also filed a motion to determine rent which asked the county court to address the motion to dismiss prior to hearing the rent issue. Without holding a hearing on either motion, the court entered an order granting possession to respondent. Although titled “final order,” the order retained jurisdiction to determine damages and so it was not truly final.<sup>1</sup>

Petitioners originally filed an appeal of the eviction order. Non-final orders from a county court are generally not reviewable by the circuit court.<sup>2</sup> This Court, in an order

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<sup>1</sup> The county court has stayed the eviction pending resolution of this petition and petitioners are now making regular deposits into the court registry.

<sup>2</sup> Florida Rule of Appellate Procedure 9.130 gives the district courts of appeal authority to review certain non-final orders, including orders granting immediate possession of property. Fla. R. App. P. 9.130(a)(3)(C)(ii). While this rule is not applicable to the circuit courts acting in their appellate capacity (*Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994)), it is still indicative of the type of non-final orders that the appellate courts have considered “the most urgent” and requiring immediate review. *Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011).

rendered on March 9, 2014, treated the appeal as a petition for writ of certiorari but found it did not have jurisdiction to review the order. Petitioners filed a petition for writ of certiorari with the Fifth District Court of Appeal seeking review of this Court's dismissal of their action. The appellate court ruled that while this Court properly treated the appeal as a petition for certiorari, it erroneously determined it did not have jurisdiction. The Fifth District remanded the matter to this Court to consider the merits of the petition. *Morgan v. Hewitt*, 150 So. 3d 1273 (Fla. 5th DCA 2014).

Petitioners allege that they have a vested ownership stake in the contested property, where they have lived for five years. If this is true, section 83.42(2), Florida Statutes (2014), specifically excludes this property from the provisions of the residential landlord-tenant statute:

**83.42 Exclusions from application of part.—This part does not apply to:**

(2) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months' rent or in which the buyer has paid at least 1 month's rent and a deposit of at least 5 percent of the purchase price of the property.

Where a tenant makes a claim of ownership in a landlord's action for possession, a court errs by ordering an eviction or by ordering rent to be deposited with the court registry without holding a hearing on the tenant's assertion. *Frey v. Livecchi*, 852 So. 2d 896, 898 (Fla. 4th DCA 2003); *RSG, LLC v. Lenet*, 107 So. 3d 1187, 1188 (Fla. 3d DCA 2013). A determination of the claim of ownership would be dispositive as to the county court's jurisdiction over the eviction action. *Grimm v. Huckabee*, 891 So. 2d 608, 609 (Fla. 1st DCA 2005).

Respondent asserts that petitioners' motion to dismiss was legally insufficient since it referenced only a document (the lease/purchase contract) which, under its own

terms, had expired in 2010; he contends that the trial court therefor properly declined to hold a hearing on the unsupported claim of ownership. But even real estate contracts, under certain circumstances, may be subject to oral modification or extension, as was alleged here. *Henley v. MacDonald*, 971 So. 2d 998, 1001 (Fla. 4th DCA 2008). By failing to hold an evidentiary hearing on the question of whether a lease/purchase contract existed that met the terms of section 83.42(2), Florida Statutes--an issue timely and adequately raised by petitioners--the trial court departed from a clearly established principal of law and failed to first determine whether it had jurisdiction to order the eviction.

As for material and irreparable harm that cannot be remedied upon issuance of the final order, petitioners have to been ordered to leave a home in which they claim to have an ownership interest, claim to have paid a deposit to exercise the purchase option and claim to have invested considerable sums in the home during five years of occupancy. This is different from an ordinary residential landlord-tenant dispute where the tenant claims a defense to eviction. Money damages most likely can compensate a wrongfully evicted tenant who has to find another place to rent. However, because of the unique, non-fungible nature of real property, money damages are often considered an inadequate remedy at law for a would-be purchaser; this is why specific performance rather than money damages is sometimes an appropriate remedy for violation of a real estate contract. *Sterling Crest, Ltd. v. Blue Rock Partners Realty Group, LLC*, 164 So. 3d 1273, 1278 (Fla. 5th DCA 2015); *Kaufman v. Lassiter*, 520 So. 2d 692, 693 (Fla. 4th DCA 1988). By losing possession of the house at this point in time and waiting to address the trial court's error on appeal of the final order, petitioners would suffer irreparable harm

not readily remediated by money damages should they prevail in having the proceedings below dismissed.

Whether the claimed leased/purchase contract does in fact exist and what its terms are remain open questions. But to remove petitioners from this house without first resolving the matter of county court jurisdiction over this eviction is a miscarriage of justice.

IT is THEREFORE ORDERED AND ADJUDGED that the petition for writ of certiorari is **GRANTED**. The order of possession is **QUASHED** and the matter **REMANDED** for further proceedings.

DONE AND ORDERED in Orlando, Orange County, Florida this 20th day of August, 2015.

/S/ \_\_\_\_\_

**ALICE L. BLACKWELL**  
**Presiding Circuit Judge**

SHEA and G. ADAMS, JJ., concur.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing order was furnished to the **Honorable Tina L. Caraballo**, Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801; **Scott A. Smothers, Esq.**, 175 East Main Street, Suite 111, Apopka, Florida 32703; and **Allan C. Draves, Esq.**, 401 West Colonial Drive, Suite 4, Orlando, Florida 32804-6855 this 21st day of August, 2015.

/S/ \_\_\_\_\_

Judicial Assistant