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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

PETITIONERS' REPLY TO LENNAR CAROLINAS' RETURN TO PETITIONERS' MOTION FOR TAXATION OF COSTS

Petitioners Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow, (collectively, "Homeowners"), through their undersigned counsel, hereby respectfully submit this brief Reply to Lennar Carolinas' Return to Petitioners' Motion for Taxation of Costs.

Contrary to Lennar's contention, taxation of costs is appropriate. First, Lennar pursued an appeal despite the lower court's finding that unconscionable and oppressive terms pervaded ***each*** of the arbitration provisions drafted by Lennar, including the arbitration provisions contained in the Purchase and Sale Agreement, and not just the document as a whole, stating, "Similar to *Simpson* and *D.R. Horton*, Lennar's arbitration clause is 'made unconscionable' by oppressive provisions which pervade ***each*** **of the arbitration provisions** within the Documents, thereby rendering severability impractical, if not impossible. Thus, in line with South Carolina jurisprudence, ***each*** **arbitration provision contained in Lennar's Purchase and Sale Agreement (§§16 and 17, and Rider B)**, Lennar's Limited Warranty in its entirety, Arbitration provision in the Covenants and Restriction and Deed, are 'excise(d) (…) altogether,' and **are ultimately rejected by this Court.**" (R. p. 17, para. 1) (Emphasis added). Even if the lower court erred by considering unconscionable terms outside of Lennar's arbitration provisions, it still correctly found that the arbitration provisions were themselves unenforceable due to unconscionable and oppressive terms that pervaded them. "In conclusion, this [Order] denies Lennar's Motion to Compel Arbitration **based on unconscionable provisions *of the arbitration provisions***." (R. p. 22, last para.) (Emphasis added). Despite the lower court's finding that each of the arbitration provisions were unconscionable due to the oppressive terms that pervaded them, Lennar pursued this appeal, resulting in avoidable cost and delay to all parties involved.

Second, Taxation of Costs is appropriate because Lennar improperly used this appeal to bar Petitioners from pursuing claims against the subcontractor defendants for over four years, bringing litigation of these claims to a complete standstill. As background, on May 31, 2018, the Circuit Court granted Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery, noting, *inter alia*, that "matters relating to claims against subcontractors are not affected by the appeal. There are

no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. [...] As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors." (Order Granting Pl's Motion to Lift Stay for Purposes of Discovery, p. 6, attached hereto as Exhibit A).[1]

On June 5, 2018, Lennar filed a Petition ***with the Court of Appeals*** seeking review of the Circuit Court's Order wherein it specifically argued that Homeowners claims were subject to arbitration regardless of whether the claims were against Lennar or the Subcontractor Defendants. Lennar argued that it *could* force Homeowners to arbitrate their claims against the Subcontractor Defendants despite the fact that no agreements—arbitration or otherwise—existed between the Homeowners and the Subcontractor Defendants, stating:

> As justification for its decision to lift the automatic stay, the circuit court espoused the notion that Rule 205, SCACR, allows that "nothing in these Rules shall prohibit the lower court. . . from proceeding with matters not affected by the appeal." However, the circuit court failed to recognize that the appeal in this case affects the very existence of the case in the circuit court. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Plaintiffs acquired the houses in issue, (b) the property itself, or (c) relating to any personal injury or property damage alleged by Plaintiffs are to be submitted to binding arbitration. **Thus, regardless of whether Plaintiffs make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration because all of the claims arise under and are related to the property and Plaintiffs' claimed injuries and damages sustained because of alleged defects in the properties. There are no claims in the case which are not affected by and at issue in the decision to compel arbitration.**
>
> **[…]**
>
> **In its appeal, Lennar asserts the circuit court erred in not compelling each and every party to this action to arbitration. Therefore, the entire action was**

[1] Homeowners note that the filings referenced hereinafter were previously submitted to this Court as exhibits in support of Homeowners Motion to Lift Stay, filed February 28, 2022, and Homeowners Return to Lennar's Petition for Rehearing, filed October 12, 2022. For the Court's convenience, these exhibits have been relabeled an enclosed with this Reply.

> **removed from the circuit court's jurisdiction and automatically stayed for the duration of Lennar's appeal.** (Emphasis added)
>
> (Appellant Lennar Carolinas, LLC's Petition to Review the Circuit Court's Order Lifting Automatic Stay, filed with COA on June 5, 2018, pp. 5-6, attached hereto as Exhibit B)

As made clear by the above passage, Lennar did not intend Section 16.4 of the Purchase and Sale Agreement to serve as "a simple joinder provision" as it would later state. To the contrary, Lennar took a scorched-earth approach against the Homeowners and sought to use this appeal to force Homeowners to arbitrate claims against the Subcontractor Defendants despite the fact that no agreements, arbitration or otherwise, existed between them.

Lennar would not even allow Homeowners to settle their claims while this case was on appeal. On November 8, 2019, for example, Homeowners and two subcontractor Defendants filed a Joint Petition ***with the Court of Appeals***, wherein they sought approval of a partial settlement and limited class certification for the *sole purpose* of settlement approval. (Joint Petition, attached hereto as Exhibit C). Lennar sought to block Homeowners' settlement with the subcontractors, framing the Petition as "a veiled request of the Court to issue an order lifting the stay of the case." (Lennar's Return to Joint Petition, filed November 18, 2019, p. 4, attached as Exhibit D). As a result of Lennar's opposition, the Court of Appeals denied Homeowners' Petition. (Order, filed November 27, 2019, attached as Exhibit E). Consequently, Homeowners were not able to conduct ***any*** discovery or resolve ***any*** claims against the subcontractor defendants' for over four years. Homeowners were not even able to conduct discovery to ascertain which of the third-party defendants it may have tenable claims against. **Lennar's dilatory actions throughout the course of this appeal served no justifiable purpose and resulted in the need for unnecessary motion practice throughout the course of this appeal.**

Additionally, it was only after a series of pointed questions during oral argument before this Court that Lennar finally conceded it did not have the right to force the Homeowners to arbitrate their claims against the Subcontractor Defendants, particularly where no arbitration agreements exist between the Homeowners and the Subcontractors. (Supreme Court Oral Argument, Recording 32:45). While Lennar conceded this point at oral argument, it later backpedaled when it responded to Homeowners' most recent Motion to the Supreme Court to Lift the Stay, stating, "[E]very party in the case is subject to an arbitration agreement and every cause of action in the case will be part of the arbitration. The allegations and claims presented by Plaintiffs all involve Lennar. Furthermore, all issues—whether related to Plaintiffs' claims against Lennar, Plaintiffs' claims against subcontractors or Lennar's claims against each of the subcontractors—are intertwined and inherently and fundamentally affect each other." (Lennar's Return to Homeowners' Motion to Lift Stay, filed March 10, 2022, p. 4, attached hereto as Exhibit F). Lennar's dilatory and obstructionist tactics throughout this entire appeal resulted in unnecessary costs and delay for all parties involved. Accordingly, Homeowners respectfully requests that costs be taxed against Lennar in the amount set forth in their Motion.

CONCLUSION

Homeowners respectfully request that this Honorable Court grant their Motion for Taxation of Costs against Lennar. As set forth hereinabove and in Homeowners' Motion, taxation of costs is appropriate because Homeowners counsel expended significant time and resources defending against Lennar's appeal and pursuing the Petition for Writ of Certiorari. In addition, Taxation of Costs is appropriate because Lennar pursued the appeal despite the lower court's finding that unconscionable and oppressive terms pervaded *each* of the arbitration provisions, including the arbitration provision contained in the Purchase and Sale Agreement. Taxation of costs is also appropriate because Lennar

improperly used this appeal to bar Homeowners from pursuing claims against the subcontractor defendants, bringing litigation of these claims to a complete standstill for over four years, and requiring Homeowners to engage in unnecessary motion practice throughout this appeal.

Respectfully submitted,

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