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Mar 23 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001223
Case No. 2019-CP-10-04807

Erik Kramer and Kevin N. Hedges, on behalf of themselves and others similarly situated, Respondents,

v.

Lennar Carolinas, LLC, Alpha Prime, LLC, Alpha Prime Construction, LLC, Sagehorn and Company, Inc., and Royal Palms Holding, LLC, Defendants,

of which Lennar Carolinas, LLC is the Appellant.

**APPELLANT LENNAR CAROLINAS, LLC'S
REPLY TO RESPONDENTS' RETURN
TO THE MOTION TO HOLD APPEAL IN ABEYANCE**

Appellant Lennar Carolinas, LLC (“Lennar”) submits this Reply to Respondents Kevin Hedges and Erik Kramer’s (collectively, “Owners”) Return to the Motion to Hold Appeal in Abeyance. For the reasons set forth below, and those set forth in the Motion to Hold Appeal in Abeyance and the arguments submitted in support thereof, it is prudent and proper for the Motion to be granted and for the appeal to be held in abeyance until the Supreme Court of the United States issues a final decision on Lennar’s Petition for a Writ of Certiorari in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

I. Owners' Return to the Motion to Hold the Appeal in Abeyance further demonstrates that good cause exist for holding the appeal in abeyance.

Owners' Return to the Motion to Hold the Appeal in Abeyance itself demonstrates that good cause exists for holding this appeal in abeyance. Owners' Return argues expressly that the outcome of this appeal will be affected by the final resolution of the *Damico* appeal. Specifically, Owners argue that “[s]ince the arbitration provisions [at issue in this appeal and in *Damico*] are identical, ***Damico* is controlling.**” (Return p. 3 (emphasis added)). Such continued reliance on and linkage to the *Damico* decision demonstrates plainly that the final outcome of the *Damico* appeal will likely impact the resolution of the appeal in the captioned matter.

If the Court were to proceed with oral argument, and a decision on this appeal based upon the current holding in *Damico* and the Supreme Court of the United States subsequently reverses the South Carolina Supreme Court's *Damico* decision, then the Court and the parties will have wasted valuable resources in analyzing and resolving the pending appeal based upon law that is not applicable. Thus, if the South Carolina Supreme Court's opinion in *Damico* is reversed, the appeal in the captioned matter will have been argued and decided under invalid legal precedent.

Moreover, contrary to the Owners' argument, the current appellate court rules do not permit Lennar to “renew” its appeal if a decision is rendered and the authority that Owners argue is controlling is reversed. There is no reason for this Court to proceed with the above-captioned appeal when the authority the Owners' argue “is controlling” is subject to being reversed by the United States Supreme Court.

II. Lennar did not cause unwarranted delay in the resolution of its right to compel Owners to arbitrate their purported claims against Lennar.

In the Return, Owners blame Lennar for the time it has taken in this appeal to obtain a final ruling on Lennar's Motion to Compel Arbitration. Owners' assertion is unjustified and incorrect.

Lennar was not responsible for the time it took the circuit court to schedule the hearing on its Motion to Compel Arbitration. Lennar was not responsible for the time the circuit court took to issue its rulings on Lennar's Motion to Compel Arbitration. Lennar is not responsible for the time in which this Court schedules oral argument on the pending appeal.

As evidenced by the procedural history in this matter, Lennar timely asserted its right to compel the Owners to arbitrate their purported claims, and Lennar took no improper or unwarranted action to delay the resolution of its Motion to Compel Arbitration:

1. On October 29, 2019, the original named plaintiff (Susan Rhoden) filed an Amended Complaint adding Owners as named plaintiffs in this case.
2. On December 18, 2019, Lennar timely filed a Motion to Compel Owners to Arbitration.
3. More than six months later, on July 14, 2020, the circuit court scheduled and heard arguments on Lennar's Motion to Compel Arbitration.
4. On July 16, 2020, the circuit court issued its order denying Lennar's Motion to Compel Arbitration.
5. Thereafter, Lennar timely filed a Motion to Alter or Amend on July 27, 2020.
6. The circuit court issued an order denying Lennar's Motion to Alter or Amend on August 5, 2020.
7. Following the denial of the Motion to Alter or Amend, Lennar timely filed its Notice of Appeal of the orders denying the Motion to Compel Arbitration on September 4, 2020.
8. The parties submitted their Final Briefs to the Court of Appeals on May 7, 2021.

Lennar has taken no action to unreasonably delay the resolution of its right to compel Owners to arbitrate their purported claims. Lennar is not responsible for the Owners' apparent dissatisfaction with the time taken by the courts finally and correctly to resolve Lennar's Motion to Compel Arbitration.

Lennar's motion to enforce its right to compel the Owners to arbitrate their purported claims is not a "stall tactic." In fact, the Court in *Grant v. Chevrolet*, 431 S.C. 279, 285, 847 S.E.2d 806, 809 (Ct. App. 2020) recognized that the benefits of arbitration include "greater efficiency and speed" in resolving a claim. It is the Owners who delayed the resolution of their claims by refusing to accept these benefits and declining to abide by their contractual agreement to arbitrate disputes with Lennar. The Court should reject Owners' argument that Lennar's Motion to Hold the Appeal in Abeyance is a "stall tactic." Rather, Lennar is requesting the Court hold the appeal in abeyance because judicial economy favors a resolution that is based upon authorities that are valid and enforceable. Furthermore, judicial economy favors holding this appeal in abeyance because the law applicable to this appeal is at risk of being changed as a result of a pending appeal involving a substantially similar agreement to arbitrate disputes between Lennar and homeowners.

III. Owners' personal opinions as to the Supreme Court of the United States' potential decision on the Petition for Writ of Certiorari in *Damico* are irrelevant.

Owners argue that holding the appeal in abeyance is not justified because they believe that the Supreme Court of the United States will not grant certiorari to review the South Carolina Supreme Court's opinion in *Damico*. Owners' opinions as to the merits of the pending Petition for a Writ of Certiorari in *Damico* or the ultimate conclusions of the United States Supreme Court thereon, have no bearing on Lennar's Motion to Hold this Appeal in Abeyance.

Available information belies the conclusion that the interested homeowners in *Damico* believe the Petition for a Writ of Certiorari that was filed with the Supreme Court of the United States in that case has no prospect of success. Those homeowners have retained the law firm Goldstein, Russell & Woofter, LLC to represent them and prepare their Return to the Petition for a Writ of Certiorari. That law firm touts itself as a "boutique appellate law firm that focuses on representation before the United States Supreme Court" that represents clients in "important appeals throughout the country and in the Supreme Court." Clearly, the actual parties to the

Damico case recognize the potential for the Supreme Court of the United States to grant the Petition for a Writ of Certiorari. Owners' opinions to the contrary regarding the merits the Petition or future action thereon by the Supreme Court of the United States bear no weight or relevance to this Court's analysis of the pending Motion to Hold the Appeal in Abeyance.

IV. Owners' additional argument regarding the application of the Federal Arbitration Act provides no persuasive basis for proceeding with this appeal until after the United States Supreme Court issues a final ruling on the Petition for a Writ of Certiorari in *Damico*.

Owners contend that in addition to their reliance on the South Carolina Supreme Court's opinion in *Damico*, the Court should proceed with holding arguments on this appeal because they argue that the transaction at issue does not involve interstate commerce. Therefore, they assert that the Federal Arbitration Act (the "FAA") does not apply to their Purchase and Sale Agreements with Lennar. Owners are incorrect.

The South Carolina Court of Appeals and the Supreme Court each concluded that the Lennar Purchase and Sale Agreements at issue in *Damico* involved interstate commerce. Those conclusions were based upon a very similar record on this issue as exists in this case. The Court of Appeals in *Damico* held that the Purchase and Sale Agreements involve interstate commerce because the parties to those contracts agreed that the "transaction involves interstate commerce." *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020), *aff'd in part, rev'd in part*, 437 S.C. 596, 879 S.E.2d 746 (2022). The Court of Appeals also held that the construction of the owners' homes involved interstate commerce as evidenced by the affidavit of Lennar's Controller stating that the construction of the homes used out-of-state contractors and materials and equipment manufactured outside South Carolina. *Id.* at 196–97, 844 S.E.2d at 71. The South Carolina Supreme Court in *Damico* did not comment on the express agreement that the transaction involved interstate commerce. Instead, like the Court of Appeals, the South Carolina Supreme Court found the transactions "manifestly involve interstate commerce, as they involved

the construction of new homes built to [the homeowners'] specifications.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022).

The Record in this appeal is substantially similar to the record in *Damico*. In this case—like in *Damico*—the Purchase and Sale Agreements contain an express agreement that the “transaction involves interstate commerce.” (R. 191-192; 255-256). Furthermore, the Record in this case demonstrates that each of the Owners executed Option Summaries with respect to their townhomes to be built. In Kramer’s Option Summary, he selected a floor area plan, chose to add a fireplace on an interior side wall, and made selections related to the color of his walls, cabinets, countertops, hardwood floors, carpets, shower tile, and kitchen backsplash. (R. 234-236). Similarly, in Hedges’s Option Summary, he selected a floor area plan and made the selections related to the color of his walls, cabinets, countertops, hardwood floors, carpets, shower tile, and kitchen backsplash. (R. 298-309). Hedges chose not to include the additional and optional interior fireplace. The Owners’ Option Summaries in the Record in this case are substantially similar to the Option Summaries that the *Damico* courts found to be evidence that the transactions involved interstate commerce.

Owners’ bald assertion that the Record in this matter is “unlike” *Damico* is false. The record in both cases contain Lennar Purchase and Sale Agreements (R. 191-192; 255-256); Option Summaries evidencing the individual owners’ selection of changes to their homes (R. 234-236; 298-309); and affidavits attesting to the fact that the construction of the homes involved interstate commerce, (R. 182). Thus, Owners’ argument that this appeal should proceed because the Court may resolve the appeal based on the argument that the FAA does not apply to the arbitration provisions at issue lacks merit and is not supported by the Record in this case.

CONCLUSION

For the reasons set forth herein, Lennar requests the Court grant the Motion and issue an Order holding the above-captioned appeal in abeyance until the Supreme Court of the United States issues a final decision on Lennar’s Petition for a Writ of Certiorari in *Damico*.

s/James Lynn Werner

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PROOF OF SERVICE

The undersigned hereby certifies that on March 23, 2023, copies of **APPELLANT'S REPLY TO RESPONDENTS' RETURN TO THE MOTION TO HOLD APPEAL IN ABEYANCE** were served on all counsel of record via email containing the above referenced documents to counsels' individual AIS email addresses:

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