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May 05 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON
COUNTY
Court of Common Pleas

Keith Kelly, Circuit Court Judge

Appellate Case No. 2023-000542

Case No. 2020-CP-10-03931

Royal Palms Property Owners Association, Inc.,

Respondent,

v.

Alpha Prime LLC, Alpha Prime Construction LLC, Sagehorn And Company Inc., Royal Palms Holding LLC, Lennar Carolinas LLC, Alpha Omega Construction Group, Inc., Valmar Nunes, individually, Bruza Construction LLC, Simons Construction Company, LLC, Cesar E Desouza a/k/a Cesar Desouza, individually, Raul Martinez Masonry LLC, Mark Wolverton, individually, DVS, Inc., Carolina Foundation, Inc., CEBS Construction, LLC a/k/a CEBS Custom Homes, LLC, Archer Exteriors, Inc., JAS Construction Services, LLC, Henry Palmer, individually and d/b/a Palmer's Construction Services, LLC, Angelo De Souza, individually and d/b/a Sunrise Siding, LLC, WW Pereira Construction, LLC, GC General Construction, LLC, Siding Construction, LLC, Builders Firstsource - Southeast Group, LLC, Associated Materials Incorporated a/k/a and d/b/a Alside; Cohen's Drywall Company, Inc.; Guaranteed Framing, LLC; Hurley Services, LLC; Sunrise Windows And Doors, LLC; Pereira Construction, LLC; Della Putti Construction; J. Plitz Construction, LLC; CMAC Construction, LLC; Henry's Construction & Trucking, Inc.; Charlotte Mechanical, LLC; Ethridge Electric Co., LLC; Builders Insulation of North Carolina, LLC a/k/a City Wide Insulation of Madison, Inc. a/b/a Builders' Insulation; Tradition Builders, Inc.; Heaven Woodworks, Inc.; Bishop & Sons Plumbing & Piping, Inc.; Arteaga Roofing, LLC; Melinda Amador; James Bayles; Blanca Christina Lopez a/k/a Blanca Christina Chaves; Flavio Morales; Daniel Leon Ramos; Juan Garza Ramos; Fidel Morales; and City Wide Insulation of Madison, Inc. d/b/a Builders Insulation; Defendants

Of which Lennar Carolinas, LLC is the Appellant.

And

Builders Firstsource-Southeast Group, LLC, Third Party Plaintiff

v.

Hurley Services, LLC and Sunrise Windows and Doors, LLC and Sunrise Windows and Doors LLC, Third-Party Defendants

And

Sagehorn and Company, Inc., Third Party Plaintiff

v.

Henry's Construction Trucking, Inc., Charlotte Mechanical, LLC, Ethridge Electric Co., LLC, Builders Insulation of North Carolina, LLC, Tradition Builders, Inc., Heaven Woodworks, Inc., Bishop & Sons Plumbing & Piping, Inc., and John Doe 1-10, Third Party Defendants

And

Alpha Omega Construction Group, LLC, Third Party Plaintiff

v.

Arteaga Roofing, LLC, Melinda Amador, James Bayles, Blanca Christina Lopez, Flavio Morales, Daniel Leon Ramos, Juan Garza Ramos and Fidel Morales, Third Party Defendants.

**APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO DISMISS THE APPEAL**

Appellant Lennar Carolinas, LLC ("Lennar") respectfully submits the following Return to Respondent Royal Palms Property Owners Association, Inc.'s ("Respondent") Motion to Dismiss the Appeal.

Respondent filed a Motion to Dismiss on the grounds that Lennar filed the Notice of Appeal with the Clerk of the Circuit Court out of time. Simultaneously with this Return, Lennar is filing a Motion for Leave to file the Notice of Appeal with the Clerk of the Circuit Court out of Time. The basis for this Motion is that (1) this Court's jurisdiction over the case was established when Lennar timely served the Notice of Appeal on all parties and filed that Notice of Appeal with this Court timely; (2) good cause exists for the Court to grant Lennar leave to file the Notice of Appeal with the Circuit Court out of time; (3) Lennar's filing of the Notice of Appeal with the Circuit Court two (2) days after the deadline for filing has caused no delay to

this appellate proceeding and no prejudice to Respondent. The good cause associated with Lennar's late filing of the Notice of Appeal with the Circuit Court is that Lennar's lead counsel was receiving testing and treatment for a serious illness during the time in which the Notice of Appeal was due to be filed with the Clerk of the Circuit Court and co-counsel was unexpectedly dealing with family medical issues during the time when the Notice of Appeal with the Clerk of the Circuit Court should have been filed.

The procedural history of this case further supports the Court denying the Motion to Dismiss and granting Lennar leave to file the Notice of Appeal with the Circuit Court out of time. Respondent initiated the underlying civil action by filing a complaint asserting purported construction defect claims against Lennar and other subcontractor and developer defendants. In response to the Complaint, Lennar filed a Motion to Compel Arbitration pursuant to the arbitration provision in the Royal Palms Declaration of Covenants, Conditions, and Restrictions. On January 24, 2023, the Circuit Court held a hearing on Lennar's Motion to Compel Arbitration, and on February 10, 2023, entered an order denying Lennar's Motion to Compel Arbitration. Lennar timely filed a Motion to Alter or Amend the Order denying the Motion to Compel Arbitration. On March 2, 2023, the Circuit Court issued an order denying the Motion to Alter or Amend without holding a hearing.

On April 3, 2023, Lennar filed timely with the Court of Appeals a Notice of Appeal of the Orders denying the Motion to Compel Arbitration and denying the Motion to Alter or Amend. That same day Lennar served the Respondent and all counsel of record with the Notice of Appeal. On April 7, 2023, Lennar provided the Court and the parties to this case with notice that it had requested a copy of the transcript of the hearing on Lennar's Motion to Compel Arbitration.

Rule 203(d)(B), SCACR, provides that an appellant file the Notice of Appeal with the lower court within ten (10) days following service of the Notice of Appeal. Therefore, since

Lennar served the Notice of Appeal on all other parties, and filed the Notice of Appeal with the Clerk of the Appellate Court on April 3, 2023, Lennar should have filed the Notice of Appeal with the Clerk of the Circuit Court by Thursday, April 13, 2023. *See* Rule 203(d)(B), SCACR. However, Lennar actually filed the Notice of Appeal with the Clerk of the Circuit Court on Monday, April 17, 2023.

On April 26, 2023, Respondent filed a Motion to Dismiss the captioned appeal on the grounds that Lennar filed the Notice of Appeal with the Circuit Court out of time.

Contemporaneously with this Return to the Motion to Dismiss, Lennar is filing a Motion for Leave to File the Notice of Appeal with the Circuit Court out of Time. That Motion also has set forth the reasons Respondent's Motion to Dismiss the appeal should be denied and Lennar should be granted leave to file the Notice of Appeal with the Circuit Court out of time.

Respondent's Motion to Dismiss Lennar's appeal provides no real authority and no rational basis why the appeal should be dismissed under the attending circumstances. Respondent merely asserts the appeal should be dismissed because Lennar filed the Notice of Appeal with the Circuit Court two (2) business days after the initial filing deadline. Respondent makes no argument that it has or will be prejudiced by Lennar's late filing of the Notice of Appeal with the Circuit Court, or that the appellate proceedings will be delayed in any way. Furthermore, Respondent's Motion ignores, or seeks to trivialize that the Notice of Appeal was timely served on all parties and timely filed with the Appellate Court. Similarly, Respondent does not recognize or acknowledge that South Carolina law holds that the appellate court's jurisdiction over this case/appeal was established upon the service of the Notice of Appeal upon the parties. *See* Rule 203(b)(1), SCACR; *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985).

The filing of the Notice of the Appeal with the Circuit Court is essentially an incidental activity because when filed with the Circuit Court after service on the parties and filing with the

Appellate Court, the Circuit Court no longer even has jurisdiction in the case.

Counsel for Lennar certainly regrets and apologizes for its inadvertent error in not completing filing of the Notice of Appeal with the Circuit Court after it had served the Notice on all parties and filed the Notice with the Appellate Court. However, Lennar respectfully submits that good cause exists to allow the late filing of the Notice of Appeal with the Circuit Court because during the time when the Notice of Appeal with the Clerk of the Circuit Court should have been filed (the day before and the day of the filing deadline with the Circuit Court) the lead attorney for Lennar in this case was out receiving testing and treatment for a serious illness. Unfortunately, co-counsel who handled the service of the Notice of Appeal and the related filing of that Notice with the Clerk of the Appellate Court, also was unexpectedly dealing with family medical issues during the time when the Notice of Appeal with the Clerk of the Circuit Court should have been filed. The combination of those circumstances affecting the two attorneys who would have monitored and acted within the deadline allowed the error to occur without timely discovery. These circumstances establishing good cause for allowing the late filing of the Notice with the Circuit Court are also described in Lennar's Motion for Leave to File the Notice with the Circuit Court out of Time. Lennar respectfully submits that in this case good cause exists to allow the late filing and the interests of justice would not be served by dismissal of the Appeal. Therefore, Respondent's Motion to Dismiss should be denied.

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PROOF OF SERVICE

The undersigned hereby certifies that on May 5, 2023, copies of **APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS THE APPEAL** were served on all counsel of record via email to counsels' individual AIS email addresses:

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SC Court of Appeals

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**Re: Royal Palms Property Owners Association Inc , plaintiff, et al VS Alpha Prime
LLC , defendant, et al
Appellate Case No. 2023-000542**

Dear Mrs. Kitchings,

Enclosed is Appellant Lennar Carolinas, LLC's Return to Respondent's Motion to Dismiss the Appeal, Motion for Leave to File the Notice of Appeal with the Circuit Court Out of Time, Proof of Service, and a firm check in the amount of \$50 for the filing fee for the enclosed Motion for Leave to File the Notice of Appeal with the Circuit Court Out of Time.

Sincerely,

Katon E. Dawson, Jr.

KED

Cc:

All counsel of record via email only