THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

RECEIVED
NOV 29 2016
SC Court of Appeals

PATRICIA DAMICO, AND LENNA LUCAS, individually and on behalf of all other similarly situated, JOSHUA AND BRETTANY BUETOW, 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,

Plaintiffs,

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.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

v.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS 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, DÉCOR 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.

DÉCOR CORPORATION,

Fourth Party
Plaintiff,

v.

BARANOV FLOORING, LLC,
DJ CONSTRUCTION
SERVICES, LLC, CREATIVE
WOOD FLOORS, LLC,
GERALDO CUNHA,
EBENEZER FLOORING, LLC,
ENMANUEL FLOORING AND
SIDING, LLC, EUSI
FLOORING AND COVERING,
LLC, NICOLAS FLORES,
ALEXANDER MARTINEZ,
ISIDRU MEJIA, JUAN PEREZ
SON, ERNESTO M. PEREZ,
N&B CONSTRUCTION, LLC,
JOSE DIAS RODRIGUES,
LIVIA SOUSA, JOSE BETIO
PEREIRA, 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 which Lennar Carolinas, LLC is the Appellant and Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Edward and Sylvia Dengg; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow; Anthony and Stacey Ray; and Defendants and Third-Party Defendants A.C.&A. Concrete, Inc.; Alpha Omega Construction Group, Inc.; Builders FirstSource-Southeast Group, LLC; Coastal Concrete Southeast, LLC; Coastal Concrete Southeast II, LLC; Construction Applicators Charleston, LLC; Civil Site Environmental, Inc.; Décor Corporation; DVS, Inc.; Guaranteed Framing, LLC; Knight's Concrete Products, Inc.; Knight's Redi-Mix, Inc.; LA New

Enterprises, LLC; Land/Site Services, Inc.; Manale Landscaping, LLC; Myers Landscaping, Inc.; Ozzy Construction, LLC; Raul Martinez Masonry, LLC; South Carolina Exteriors, LLC; Southern Green, Inc.; Spring Grove Plantation Development, Inc.; Super Concrete of SC, Inc.; TJB Trucking/Leasing, LLC; and Volkmar Consulting Services, LLC are the Respondents.

MOTION TO ENFORCE STAY

Appellant Lennar Carolinas, LLC ("Lennar") respectfully moves that the Court of Appeals issue an order pursuant to Rule 205 and Rule 241, SCACR, enforcing the automatic stay of all trial court proceedings pending resolution of Lennar's appeal, including all discovery and all motions the Circuit Court was previously scheduled to hear on December 6, 2016. The grounds for this motion are that Lennar moved to compel Plaintiffs, Defendants, and Third-Party Defendants to arbitrate their claims, the Circuit Court issued an Order denying Lennar's motion, and Lennar appealed that Order.

The Circuit Court's decision denying arbitration concerns two fundamental and preliminary issues—where the claims should proceed and which procedural rules should govern. Because those issues affect the entirety of the case, Lennar believes continuation of the trial court proceedings while the issues are being decided would defeat the point of the appeal. However, prior to filing this motion, Lennar conferred with Plaintiffs and learned they believe their claims should continue in the trial court despite the appeal. Accordingly, Lennar respectfully requests an order under Rule 205 and Rule 241, SCACR, that the instant appeal automatically stays further trial court proceedings from motion practice to discovery until the appellate courts resolve the appeal and issue a remittitur.

SUMMARY OF FACTS

Plaintiffs brought this construction defect action against Lennar, an original developer, and their subcontractors. As a result of Plaintiffs' amended pleadings, the case expanded to include

seventeen Plaintiffs, Lennar, eight other Defendants, and nineteen Third-Party Defendants.[1] Lennar moved to compel all of the Plaintiffs, six of its eight co-Defendants, and eighteen of the nineteen Third-Party Defendants to submit all claims to arbitration. Lennar sought arbitration based on contracts, deeds, and covenants applicable to the parties and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), or alternatively, the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* ("SCUAA"). The Honorable J.C. Nicholson, Jr. denied Lennar's motion, Lennar moved for reconsideration which was also denied, and Lennar filed a notice of appeal on November 16, 2016.

Notwithstanding the appeal, a number of actions have been taken to continue the litigation, including:

- On November 22, 2016, the Berkeley County Clerk of Court set the following seventeen motions for a hearing on December 6, 2016:
  - Plaintiffs' motion for class certification;
  - two motions by Third-Party Defendants for summary judgment on Lennar's claims;
  - two motions to dismiss Lennar's cross-claims/third-party claims;
  - two motion to dismiss cross-claims asserted by another Defendant;
  - a motion to dismiss Plaintiffs' claims;
  - Plaintiffs' motion to compel a subpoena response;
  - three motions to compel discovery responses from Lennar;
  - four motions to compel discovery responses from other parties; and
  - two motions by Third-Party Defendants to amend their pleadings to assert claims

[1] Lennar dismissed its claims against two additional Third-Party Defendants, Geometrics Consulting, LLC and Low Country Renovations and Siding, LLP.

against fourth-party defendants.

Thereafter, Lennar learned the hearings were continued based on the pending appeal,[2] but because Plaintiffs do not acknowledge that an appeal of the Order denying arbitration acts as an automatic stay of the trial court proceedings under Rule 205 and Rule 241, SCACR, Lennar believes it is necessary to seek clarification from the Court of Appeals.

- A party noticed the deposition of Lennar's corporate representative under Rule 30(b)(6), SCRCP. *See* Exhibit B.
- Parties continue to conduct written discovery. *See, e.g.*, Exhibit C.

ARGUMENT

Under Rule 241, SCACR, an appeal "acts to automatically stay" a case except for "matters not affected by the appeal." Similarly, under Rule 205, SCACR, serving a notice of appeal confers "exclusive jurisdiction over the appeal" on the appellate court and restricts the lower court's powers to "proceeding with matters not affected by the appeal." Applying these rules, the Court of Appeals stated that once an appeal is filed, "the lower court is deprived of the power to proceed with matters that are affected by the appeal." *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012). Under Rule 205 and Rule 241's broad "affected by" standard, this entire case is affected by the appeal and thus automatically stayed.

That the appeal of an order denying arbitration affects the entirety of the case follows from the nature of arbitration and the fundamental question presented by such a motion: can the parties litigate in a judicial forum or are they bound to proceed in an arbitration forum? If parties enter into an arbitration agreement, the parties agree to resolve any disputes between them in arbitration and to

[2] A copy of the Berkeley County roster for the motion week of December 5, 2016 is attached hereto as Exhibit A and notes for each pending motion, "Continued...appeal pending."

forego their rights to seek relief in a judicial forum. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667–68 (2007); *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 74, 709 S.E.2d 708, 709 (Ct. App. 2011). Therefore, where parties select arbitration, the parties opt to have all decisions made by an arbitrator, opt for the procedural rules of the particular arbitration forum, and are not entitled to pursue discovery before a circuit court or seek rulings from a circuit court.

That the decision of whether parties are bound to arbitrate a dispute affects the entirety of a case is also reflected in South Carolina's appellate procedure. Whether sought under the FAA or the SCUAA, litigants have a right to immediate appellate review of a ruling denying a motion to compel arbitration. *See Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34–35, 524 S.E.2d 839, 842–43 (Ct. App. 1999). That right to immediate appellate review is the result of a "deliberate determination that appeal rules should reflect a strong policy favoring arbitration," *Towles*, 338 S.C. at 34–35, 524 S.E.2d at 842–43, and the fact that because an arbitration appeal affects where the case proceeds, who decides the issues, and which procedural rules apply, the arbitration issue is an issue that must be resolved before any further litigation can take place.

Recognizing these principles, South Carolina courts have acknowledged that the entire case is affected and thus stayed when a party appeals the denial of arbitration. For example, while addressing whether the denial of a motion to compel arbitration is immediately appealable, in *Towles* this Court held that a circuit court could not refuse to compel arbitration until after the parties conducted discovery because to do so would "favor[] litigation over arbitration" and not respect the parties' agreement to arbitrate. *Towles*, 338 S.C. at 35, 524 S.E.2d at 842–43. In *Cape Romain Contractors, Inc. v. Wando E., LLC*, Appellate Case No. 2011-197207, *see* Exhibit D attached

hereto, this Court denied a party's motion to remand a case for limited discovery while there was a pending appeal on the lower court's decision denying arbitration, thereby acknowledging that the right to conduct discovery is affected by an arbitration appeal and unless the appellate courts order otherwise is stayed by the appeal.

Also, the Honorable John Few, then a circuit court judge, ordered in *Chassereau v. Global-Sun Pools, Inc.*, No. 03-CP-25, 476, 2006 WL 6087626 (Com. Pl., March 29, 2006), *see* Exhibit E attached hereto, that a case was stayed and discovery could not proceed until the appellate courts resolved the defendant's appeal of its arbitration rights. Justice Few reasoned that "[t]he general rule in South Carolina is that discovery is stayed pending an appeal" and that an arbitration appeal affects the threshold issue of the forum for resolution of the dispute and thus the availability of and rules governing discovery. He also reasoned that allowing discovery to proceed while an appeal denying arbitration is pending would defeat the purpose of permitting an immediate appeal and create a significant risk of wasting judicial and litigant resources. Additionally, the Honorable J.C. Nicholson, Jr., the circuit court judge who issued the Order on appeal here, granted a motion to stay a case until an appeal of the denial of a motion to compel arbitration was resolved. *See* Exhibit F attached hereto.

Likewise, the United States Court of Appeals for the Fourth Circuit and the majority of federal circuit courts adopted the rule that an appeal of an order denying arbitration stays the entirety of the case until resolution of the appeal. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011). The Fourth Circuit held that "[t]he core subject of an arbitrability appeal is the challenged continuation of the proceedings before the district court on the underlying claims" and thus, "permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction." *Id.* The Fourth Circuit relied on the seminal decision on this issue,

Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504 (7th Cir. 1997), which states that a notice of appeal confers jurisdiction on the appellate court and divests the lower court of jurisdiction over all aspects of the case involved in the appeal. *Bradford-Scott*, 128 F.3d at 505. The *Bradford-Scott* decision then found that the appeal of a denial of arbitration affects the entire case, reasoning that "[w]hether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal [of a denial of a motion to compel arbitration], however; it is the mirror image of the question presented on appeal." *Id.*

Additionally, not only does an appeal of the denial of a motion to compel arbitration affect the entirety of the case and thus stay the case, this result is necessary to avoid duplicative and wasteful expenditures of judicial and litigant resources. If such an appeal does not stay the case, the circuit court could rule on numerous procedural and dispositive motions during the pendency of the appeal, only to have the appellate court reverse the circuit court and order arbitration. The parties would then have to re-litigate those same issues before the arbitrator, and the parties and circuit court's efforts while the appeal was pending would have been unnecessary and wasteful. The Fourth Circuit highlighted the inefficiencies that would result from permitting litigation to continue before a trial court during an arbitrability appeal, stating:

> Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. . . Cases of this kind are therefore poor candidates for exceptions to the principle that a notice of appeal divests the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals.

Id. at 506.

While the decisions and reasoning outlined above establish that an arbitrability appeal automatically stays the entirety of the case, even were there an exception to that rule, the

characteristics of this case make a complete stay necessary. For example, one of the pending motions is Plaintiffs' motion to certify a class of homeowners. However, under the FAA, a party cannot pursue class claims in arbitration unless the arbitration agreement explicitly provides for class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. 662, 684 (2010). Additionally, contracts that contain the arbitration agreements at issue here expressly waive the right to pursue class claims. Therefore, a determination as to whether enforceable arbitration agreements exist is a prerequisite to consideration of any motion for class certification.

Furthermore, the scope of Plaintiffs' claims, and as a result, the scope of discovery, depend on the outcome of this appeal. There are sixty-nine homes in the residential community that is the subject of this dispute, and Plaintiffs own only a few of those homes. If Plaintiffs are subject to an enforceable arbitration agreement and cannot pursue claims on behalf of a class, only their homes are at issue and the scope of this case and the scope of discovery are significantly reduced. For example, of the many subcontractor defendants who are presently parties to this dispute due to Plaintiffs' putative class action, any subcontractor defendants who performed work in the development but did not perform work on Plaintiffs' homes likely could be dismissed.

Finally, Lennar moved to compel arbitration as to *all* of the Plaintiffs and nearly all of the Defendants and Third-Party Defendants. Therefore, there is no portion of this case that could be severed from those portions potentially subject to arbitration and permitted to proceed. Plaintiffs' ability to pursue any of their claims in a judicial forum is at issue in the appeal, and until that issue is resolved, there are no claims that can proceed before the Circuit Court.

CONCLUSION

For the foregoing reasons and pursuant to Rule 205 and Rule 241, SCACR, Lennar respectfully requests the Court issue an order enforcing the automatic stay of this case during the pendency of this appeal.

November 29, 2016

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[3] Myers Landscaping, Inc. was served but has not appeared.

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November 29, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
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RECEIVED
NOV 29 2016
SC Court of Appeals

Re: ***Damico, et al. v. Lennar Carolinas, LLC, et al.***
Case No.: 2014-CP-08-02424

Dear Ms. Kitchings:

Enclosed for filing please find the original and two copies of a Motion to Enforce Stay in connection with the above-referenced matter. Also enclosed is our firm check in the amount of $25.00 to cover the cost of filing.

Please file the original and return the filed-stamped copies to me by providing to the courier of this letter. Please do not hesitate to contact me if you have any questions. By copy of this letter, we are serving same on all parties.

Sincerely,

F. Elliotte Quinn IV

FEQiv/tlr

Enclosures

cc: All Counsel of Record (via email and US Mail with enclosures)
Edward and Sylvia Dengg (via US Mail with enclosures)
Anthony and Stacey Ray (via US Mail with enclosures)
Joseph H. Myers, Registered Agent (via US Mail with enclosures)

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