THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000218
Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Appellant,

and

South Carolina State Plastering, LLC,..... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes, Inc.,
and Kephart Architects, Inc., ... Third-Party Defendants,

OF WHOM Del Webb Communities, Inc., and Pulte Homes, Inc., are, ... Appellants.

DEL WEBB'S RETURN TO PETITION TO LIFT THE AUTOMATIC STAY

Appellants Del Webb Communities, Inc. and Pulte Homes, Inc. (together, "Del Webb") file this return to the motion of Respondents Anthony and Barbara Grazia ("Plaintiffs") to lift the automatic stay under Rule 241(d), SCACR. For the reasons that follow, Plaintiffs' motion should be denied.

INTRODUCTION

Plaintiffs seek to lift the automatic stay to force a 9,000-member class action to trial in the midst of an appeal challenging the trial court's refusal to hear evidence on class certification and to make a final determination as to whether the putative class satisfies the requirements of Rule 23, SCRCP. Plaintiffs' request has no merit. As an initial matter, Rule 241(c)(2), SCACR, allows this Court to lift the automatic stay in two situations: (1) when lifting the stay is necessary to preserve the appellate court's jurisdiction or (2) when lifting the stay will prevent the issues on appeal from being mooted. Rule 241(c)(2), SCACR. Plaintiffs have not argued that either circumstance is present here, nor can they, as the stay imposes no danger whatsoever to this Court's appellate jurisdiction and does not risk mooting any issues on appeal.

To the contrary, this case illustrates the purpose and function of the automatic stay, which promotes efficiency and judicial economy by preventing the trial court from proceeding with any matters affected by the appeal. Rules 205 & 241(a), SCACR. Were this case to proceed to trial despite the pendency of this appeal, the trial court could receive an order from this Court on the last day of a multi-week trial that a class was never properly certified, which would effectively void all of the work the court, the jury, and the parties had done in trying the case. Such inefficiency is totally unnecessary. Maintaining the automatic stay during the pendency of this appeal is imminently reasonable, and Plaintiffs have not made a serious argument to the contrary.

Instead, Plaintiffs have argued only that the Court lacks appellate jurisdiction, contending that the appealed orders are not immediately appealable, but they never argue any of the permissible grounds for lifting the stay under Rule 241(c)(2), SCACR.[1] Plaintiffs' argument

[1] Any attempt by the Plaintiffs to argue the grounds specified in Rule 241(c)(2), SCACR, in a reply would be futile and should be rejected by this Court, because it is axiomatic that arguments cannot be made for the first time in a reply. *See, e.g., Glasscock, Inc. v. United States Fid. & Guar. Co.*, 557 S.E.2d 689, 691-692 (S.C. App. 2001) (argument cannot be made for the first time in a reply brief).

would be properly directed toward SCSP's and Del Webb's motions to determine appealability, and Plaintiffs' motion to dismiss SCSP's appeal, all of which are currently pending before this Court. Plaintiffs, however, have never filed a Return to the motions to determine appealability.[2] Thus, Plaintiffs' sole argument for lifting the stay is off the mark, and Plaintiffs' request to lift the automatic stay should be denied.

FACTUAL BACKGROUND

Appellants South Carolina State Plastering, LLC ("SCSP") and Del Webb have each filed notices of appeal and petitions to the Supreme Court for extraordinary relief because the Circuit Court is on the verge of sending a 9,000-member class action to trial without first hearing the evidence and making a final determination as to whether the putative class satisfies the requirements of Rule 23, SCRCP. The Circuit Court's refusal to follow Rule 23 is immediately appealable, because it affects the merits and because it affects SCSP's and Del Webb's substantial rights, as more fully outlined in Del Webb's motion to determine appealability. (Tab 1). The circumstances leading to this case's unusual posture amply demonstrate that it is Plaintiffs, not SCSP or Del Webb, who have delayed the disposition of this matter by refusing to permit a proper Rule 23 hearing and analysis.

In 2010, the Supreme Court reversed the Circuit Court's determination that the class action device is inherently and facially incompatible with the Notice and Opportunity to Cure Construction Dwelling Defect Act, S.C. Code Ann. §§ 40-59-810 to -860 (the "Right to Cure Act") and remanded for the Circuit Court to harmonize Rule 23 and the Right to Cure Act in the context

[2] Notably, Plaintiffs' failed to file a return to SCSP's or Del Webb's motions to determine appealability, and both are well past due. Del Webb served its motion to determine appealability on February 15, 2017, making Plaintiffs' Return due on or before February 27, 2017. Rule 240(e), SCACR (10 days to serve and file return to a motion). In addition, Plaintiffs have not filed a motion to dismiss Del Webb's appeal – their motion to dismiss addresses and seeks dismissal of SCSP's appeal only. To the extent Plaintiffs' current motion is a bootstrap attempt to present Plaintiffs' arguments in opposition to the motions to determine appealability, such an attempt should be denied out of hand as untimely and contrary to the Appellate Court Rules.

of this case.[3] *Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010). The Supreme Court expressly declined to pass on whether a class should be certified in this case. *Id.* at 203 n.5 ("[T]he questions of whether certification of a class in this case is proper, much less the manner in which it could be achieved and managed, [is not] before the Court.").

On remand, the Honorable J. Michael Baxley, to whom the case was assigned as complex civil litigation, issued an order making a "preliminary finding" that the putative class met the requirements of Rule 23, SCRCP, and setting forth a procedure for complying with the Right to Cure Act (the "Preliminary Order"). (Tab 2). As more fully set forth in Del Webb's motion to determine appealability, the Preliminary Order made it clear that the Circuit Court had **not** made a final determination as to whether the putative class satisfied the Rule 23 requirements and intended to make such a determination once the Right to Cure process was completed with the benefit of evidence generated during that process. (Tab 1 at 8-16). The parties then proceeded through the Right to Cure process as outlined by the Preliminary Order, which included questionnaires filled out by thousands of homeowners, walk-around inspections of thousands of homes, the production of records on thousands of homes, depositions of some homeowners, and destructive testing on some homes.

In May 2016, as the parties neared completion of the Right to Cure process, the Honorable Edgar W. Dickson, to whom the case was assigned following Judge Baxley's retirement, issued a scheduling order that set a date for a "**final hearing**" on class certification and continued the Right to Cure stay on merits discovery "until the Court issues its ruling on **final certification**." (Tab 3 at 1) (emphasis added). Under Judge Dickson's scheduling order, as envisioned by Judge Baxley's

[3] The Right to Cure Act is designed to promote the pre-suit settlement of residential construction defect disputes by creating a series of pre-suit procedures with which parties must comply before the filing of a complaint. If a complaint is filed without the plaintiff fist complying with the Right to Cure Act, the action must be stayed pending compliance. S.C. Code Ann. §§ 40-59-830.

prior "Preliminary Order," briefs on final certification were due in August 2016, and the hearing on final certification was set for September 1, 2016. In accordance with the scheduling order, SCSP and Del Webb each submitted briefs opposing final certification, including evidence from the extensive Right to Cure process that was not available when Judge Baxley entered the Preliminary Order. In response to a further request from Judge Dickson, SCSP and Del Webb submitted additional summaries of the new evidence they intended to present at the final class certification hearing.

Instead of substantively responding to SCSP's and Del Webb's arguments, Plaintiffs repeatedly urged Judge Dickson to cancel the final certification hearing and rule that Judge Baxley—contrary to the plain language of the Preliminary Order—had actually made a final class certification. Ultimately, Judge Dickson acquiesced to this relentless onslaught, reversed his prior reading of Judge Baxley's Preliminary Order as reflected in his own Scheduling Order, cancelled the hearing, refused to entertain SCSP's or Del Webb's evidence,[4] and entered an order stating that Judge Baxley had certified the class on a final basis and that Judge Dickson would not hear any further argument on the issue of class certification. (Tab 4).

SCSP's and Del Webb's appeals followed. In addition, SCSP and Del Webb have each moved to transfer this case to the Supreme Court, and SCSP and Del Webb have each petitioned the Supreme Court for a common law writ of certiorari and/or a writ of mandamus. Had Plaintiffs and the trial court simply gone forward with the final class certification hearing on September 1, 2016 and rendered final Rule 23 findings based on the evidence presented, as clearly contemplated by Judge Baxley's Preliminary Order and Judge Dickson's Scheduling Order, and as required by Rule 23, SCRCP, this appeal would not have been filed and the case would be moving toward trial.

[4] Pursuant to Judge Dickson's direction, SCSP and Del Webb later submitted written proffers summarizing the evidence they intended to introduce at the cancelled hearing.

Thus, any delay of the trial is plainly the result of Plaintiffs' decision to oppose holding a proper final Rule 23 hearing and not of anything SCSP or Del Webb have done.[5]

ARGUMENT

A. Plaintiffs have not argued the permissible grounds for lifting the automatic stay under Rule 241(c)(2), and those grounds demonstrate that the stay should not be lifted.

When a notice of appeal is filed, the appellate court obtains exclusive jurisdiction over the appeal, and all activity affecting the matter on appeal is stayed in the trial court. Rules 205 & 241(a), SCACR. The reason for this rule is obvious: once an issue is on appeal, it would be wasteful for the trial court to continue handling matters affected by that issue because anything the trial court does may be voided by the appellate court's decision. Moreover, it would be endlessly confusing for both the trial court and the appellate court to be ruling on similar issues at the same time. In this case, there is no dispute that any trial on the merits is stayed, as any attempt to proceed to trial would plainly implicate the matter on appeal, which is whether the trial court has ever certified a class for a trial on the merits.

When a party applies for this Court to lift the automatic stay, Rule 241(c)(2), SCACR, expressly directs the Court to "consider whether such an order [lifting the stay] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule

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[5] Plaintiffs' conflate the appeals by SCSP and Del Webb. (Motion at 3-4). Del Webb appeals two orders by Judge Dickson, and Plaintiffs' only "argument" as to these orders is that they are "purely interlocutory and not subject to appeal" and "plainly interlocutory." (Motion at 3-4, 4). Plaintiffs' conclusory assertions about these orders are insufficient to present any issue for review by this Court, and this defect cannot be cured by making fuller arguments in a reply. *See, e.g., Glasscock, Inc. v. United States Fid. & Guar. Co.*, 557 S.E.2d 689, 691-692 (S.C. App. 2001) (conclusory arguments in appellant's brief present no issue for review, and fuller argument cannot be made in a reply brief). Moreover, Plaintiffs apparently (and mistakenly) believe that interlocutory orders are never immediately appealable. South Carolina law, however, plainly allows the immediate appeal of interlocutory orders under S.C. Code Ann. § 14-3-330. As demonstrated in Del Webb's motion to determine appealability (Tab 1), to which Plaintiffs have never filed a return, the orders appealed by Del Webb are immediately appealable under § 14-3-330. Finally, Plaintiffs repeatedly accuse Del Webb of appealing these two orders for the purpose of delay. (Motion at 3, 4, 6). Nothing could be further from the truth. Undersigned counsel for Del Webb has practiced almost exclusively before this Court and the South Carolina Supreme Court for over 21 years. He has never and would never file an appeal for the purpose of delay, and the present appeal is not made for the purpose of delay or any other improper purpose.

241(c)(2), SCACR. Here, Plaintiffs have not even cited these considerations, much less demonstrated that they support lifting the stay. This is not surprising, as both considerations demonstrate that the stay should not be lifted. Any attempt to make an argument under Rule 241(c)(2) in a reply would be a futile act that should be rejected by this Court. See n.1, *supra*.

The stay poses no danger whatsoever to this Court's jurisdiction of the appeal. To the contrary, the stay is preserving the Court's jurisdiction by ensuring that the trial court does nothing to interfere with it. Indeed, if anything, ***lifting*** the stay could interfere with this Court's ability to hear the appeal and grant meaningful relief, because the case would proceed to trial at the same time that this Court was considering whether the class was ever certified for a trial on the merits. While it is doubtful that the trial court could do anything to divest this Court of appellate jurisdiction, proceeding to trial while the very premise of the trial—the absence of an order certifying the class for a trial on the merits—is on appeal risks a serious waste of judicial and other resources. Were this Court to conclude, as SCSP and Del Webb argue, that the Circuit Court erred in refusing to hear the evidence and to make Rule 23 findings before proceeding to trial, any trial conducted by the Circuit Court during this appeal would be a nullity. It would therefore be immensely wasteful to lift the stay and allow the Circuit Court to proceed with a lengthy, expensive, and potentially meaningless trial while this matter is on appeal.

Likewise, lifting the stay is not needed to prevent any contested issues from becoming moot. Indeed, the stay ensures that the trial court cannot do anything to moot or otherwise affect the core issue on appeal, which is whether the court can proceed to trial without hearing the evidence and rendering final Rule 23 findings. Again, without the stay, there would be significant risk of the Circuit Court proceeding to an utterly meaningless, but time-consuming and expensive, trial that would simply waste the court's, the jury's, and the parties' time and resources for no good

reason. Avoiding such waste is precisely the purpose of the automatic stay. Thus, both of the considerations listed in Rule 241(c)(2) demonstrate that the automatic stay should be maintained, and that Plaintiffs' request to lift the stay should be denied. Indeed, this case is a textbook example of why any activity implicating the issues on appeal should be stayed, as the potential for confusion and wastefulness is significant. Therefore, Plaintiffs' request to lift the stay should be denied.

B. Plaintiffs' only argument is properly directed to the pending motions to determine appealability and to dismiss.

Plaintiffs' only argument for lifting the stay is their argument that the orders on appeal are not immediately appealable. This argument, however, is relevant only to SCSP's and Del Webb's motions to determine appealability and to Plaintiffs' own motion to dismiss SCSP's appeal, all of which are pending before the Court.[6] If the Court determines that it lacks appellate jurisdiction (and it should not), the stay will end when the Court dismisses the appeal and returns the remittitur to the trial court. Likewise, if the Court determines that it has appellate jurisdiction (and it should), the stay will end once the appeal is decided and the remittitur is returned to the trial court. In either case, the stay will serve its proper function of preserving the *status quo* pending this Court's decision on the appeal and protecting this Court's jurisdiction and ability to grant meaningful relief if the appeals are successful. Plaintiffs' argument on the merits of its motion to dismiss (made only against SCSP's appeal) may end SCSP's appeal, but the stay allows the Court to decide the issue for itself without interference from activity in the trial court. Because Plaintiffs have not advanced a cognizable argument in favor of the request to lift the automatic stay, Plaintiffs' request should be denied.

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[6] As noted earlier, Plaintiffs have not filed a Return to the motions to determine appealability, the time to do so has expired, and Plaintiffs have not moved to dismiss the appeal of Del Webb. See n.2, *supra*. To the extent the Court wishes to consider the merits of Plaintiffs' argument that the matters on appeal are not immediately appealable (and there is no reason to consider such arguments in the context of this motion), Del Webb incorporates its motion to determine appealability and its return to SCSP's motion to determine appealability by reference.

CONCLUSION

For the foregoing reasons, Plaintiffs' request to lift the automatic stay should be denied, and the stay should remain in place during the pendency of this appeal.

Respectfully submitted,

Robert L. Widener
by Janet Drinkley with permission

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March 9, 2017
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OF WHOM Del Webb Communities, Inc., and Pulte Homes, Inc., are,..... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served *Del Webb's Return to Petition to Lift the Automatic Stay* by depositing a copy in the United States Mail, postage prepaid, on March 9, 2017, addressed to all attorneys of record, as follows:

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Via Courier

Honorable Jenny Abbott Kitchings
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Re: Anthony Grazia, Plaintiff v. SC State Plastering, Defendant and Del Webb Communities, Inc., Pulte Homes, Inc. and Kephart Architects, Inc., Third-Party Defendants
Appellate Case No. 2017-000218

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Del Webb's Return to Petition to Lift the Automatic Stay, along with the original and one copy of the Certificate of Service. Please file originals in your office, and return the file stamped extra copy to me in the return envelope provided.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

Robert L. Widener

RLW/as
Enclosures

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