

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 09 2017

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

J. Michael Baxley, Circuit Court Judge
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

Respondents.

Return to Petition to Lift the Automatic Stay

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The Appellant South Carolina State Plastering, LLC submits this Return to the Petition to Lift the Automatic Stay filed by Respondents Anthony and Barbara Grazia seeking this Court's permission to allow this class action to proceed to trial on April 17, 2017. The Appellant maintains that the trial should not be allowed to go forward for three major reasons: (1) the trial court has not yet made a final ruling on class certification, and in fact, the trial court has never conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification; (2) not only has the trial court allowed this action to proceed with preliminary class certification without requiring full compliance with the Right to Cure Act,¹ the truncated compliance process as cobbled by the trial court has not even yet been completed; and (3) the Appellant SCSP has not been allowed the opportunity for full discovery in order to prepare for trial on the merits of a class action involving 4,500 houses.

In considering this motion, please take notice that there are now pending in this Court a Motion to Determine Appealability that was filed by Appellant SCSP in conjunction with its Notice of Appeal, and a Motion to Dismiss filed by the Respondents Grazias to which SCSP is filing a Return.² Appellant SCSP would direct the Court's attention to those filings for a more

¹ The Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act), S.C. Code Ann. §§40-59-810 to 860.

² In addition, a Motion to Transfer this appeal has been filed with the S.C. Supreme Court along with to a Petition for Extraordinary Relief.

complete discussion of the appealability issues and the substance of the significant issues to presented in this appeal.

Clarification of the Factual Background

The Appellant SCSP offers this clarification of the factual background as articulated by the Respondents Grazias.

First, while it is true that this class action involves approximately 4,500 houses in Sun City in Bluffton, South Carolina, this matter was NOT certified as a class by Judge Baxley. As discussed in detail in the prior filings, Judge Baxley made only a *preliminary* class certification. [12/19/11 Order.] Judge Baxley expressly stated that he would not make a final ruling until after compliance with the Right to Cure Act: “Thereafter [after compliance with the Right to Cure Act], the Court will make a final decision as to whether a class action is practicable under the specific facts and circumstances disclosed by the notices and response required under the Act.” [12/19/11 Order (Baxley), p. 2.] Compliance with the Right to Cure Act is still ongoing and no final decision has yet been made. Significantly, this means that the trial court has ever conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification.

Second, SCSP has not been allowed full and comprehensive investigation of each and every house on the putative list as is required under the Right to Cure Act; rather, the trial court has fashioned a truncated compliance process to fit together with the representative class action process. Thus, the SCSP has not been fully afforded its rights to a pre-litigation opportunity to inspect and remedy/settle.

To the extent that many claimants may be senior citizens, their age does not justify denying SCSP its statutory and due process rights to insist on RTC compliance or a proper rigorous

determination on Rule 23 class certification. Similarly, time lapse since the filing of this action is a consequence of the fact that the Appellant SCSP has been pressed to take every necessary measure by motion and appeal in an attempt to assert its rights under the Right to Cure Act and Rule 23.

The appealability of the order is separately discussed in SCSP's Motion to Determine Appealability and its Return to the Motion to Dismiss. Of the seven orders noted for appeal, # 6 - - the order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", filed September 9, 2016 – is the order that triggered the appealability of all the orders by "finalizing" Judge Baxley's preliminary class certification. A timely Notice of Appeal was served and filed within 30 days of the trial court's ruling on the motion for reconsideration, and with this timely appeal, all the prior intermediate orders are subject to review. Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005): "An order that is not directly appealable may be considered if there is an appealable issue before the court."

Any appearance that this appeal is taken for the purpose of delaying trial is merely a natural consequence of the fact that the Appellant is having to pursue this appeal to protect its substantial statutory and due process rights. In particular, the Appellant should not be having to litigate a class action where full and complete compliance with the Right to Cure Act had not been accomplished. Nor should the Appellant be forced to trial on a class action involving 4,500 houses where the trial court has never conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification. And, under no circumstances should the SCSP be forced to trial until it has been allowed the opportunity for full discovery in order to prepare for trial on the merits.

Discussion

SCSP attempted to seek review of Judge Baxley's preliminary 12/19/11 order (along with his order dismissing the associated motion for reconsideration) by noticing an appeal in 2012. However, this Court dismissed that appeal on the ground "these orders are not immediately appealable." Those orders became reviewable by virtue of Judge Dickson's 9/9/16 order declaring that the class certification was final.

As discussed in full in SCSP's Motion to Determine Appealability, the general rule that class certification orders are not immediately appealable does not apply in the unique circumstances of this case. SCSP is not seeking to challenge the trial court's discretionary decision to certify the class. Rather, the point is that Judge Baxley never made a final ruling and no trial judge has yet conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification.

Also as fully discussed in SCSP's Motion to Determine Appealability, the issue of Judge Baxley's class notice is immediately appealable under the Supreme Court's reasoning in Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81, 87 (2008), wherein the Court found that an order establishing an "opt-in" notification procedure affects a mode of trial and, thus, was immediately appealable. To the extent that a notice of appeal was not filed within 30-days of the 4/18/14 Order, it was not immediately appealable at that time because the class certification was still preliminary and it was anticipated that the notice was subject change. It became appealable when Judge Dickson issued his 9/9/16 order.

In the *Grazia I*,³ the Supreme Court discussed the implication of allowing an action to be filed prior to compliance with the Right to Cure Act, and the importance of the stay provisions of

³ Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010).

§40-59-830, which provides that: “If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.” The Court stated that:

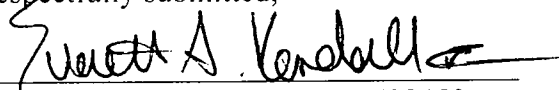
[T]he predominant concern should be on the contractor/subcontractor’s actual exercise of the rights to notice and the opportunity to cure, not when those rights are received. As discussed extensively above, we fail to discern how the rights to a pre-litigation opportunity to inspect and remedy/settle are substantially abridged when a court stays the proceedings under section 40–59–830, thereby granting the contractor/subcontractor the ability to explore those rights in full.

703 S.E.2d at 202. The Appellant SCSP has not been granted the ability to fully explore its rights to a pre-litigation opportunity to inspect and remedy/settle. Thus, the stay cannot be lifted and this case cannot proceed to trial until the RTC compliance is complete.

CONCLUSION

This appeal is taken because the trial court has not afforded the Appellant SCSP its rights under Rule 23 or the Right to Cure Act. Nor has the SCSP been afforded the time and opportunity for full discovery on the merits as allowed under the Rules of Civil Procedure. Under these circumstances, the motion to lift the stay should be denied.

Respectfully submitted,



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March 9, 2017

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Pulte Homes, Inc., are

Respondents.

Proof of Service

I, the undersigned legal assistant, of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for the Appellant South Carolina State Plastering, do hereby certify that I have served a copy of the foregoing **Return to Petition to Lift Automatic Stay** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

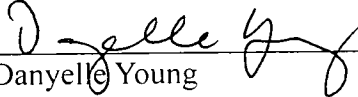
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March 9, 2017



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SC Court of Appeals

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VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
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RE: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs v. South Carolina State Plastering, LLC, Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc.
Appellate Case No.: 2017-000218
Civil Action No.: 2007-CP-07-1396
Our File: 3826-6177

Dear Ms. Kitchings:

Enclosed for filing please find the original Return to Motion to Dismiss South Carolina State Plastering, LLC's Appeal and six (6) copies of the same along with Return to Petition to Lift the Automatic Stay and six (6) copies of the same. Please return all file-stamped copies with the Courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do you hesitate to contact me.

Very truly yours,

SWEENEY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

EAK/dvy
Enclosures

March 9, 2017

Page 2 of 2

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