

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-08-02424

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2018 MAY 31 AM 11:41

FILED

Patricia Damico and Lenna Lucas,
individually and on behalf of all others
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,

vs.

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,

vs.

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,

ORDER GRANTING PLAINTIFFS' MOTION TO
LIFT AUTOMATIC STAY FOR PURPOSES OF
DISCOVERY


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,)

vs.)

 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 Aparecido Corgosinho, Ricardo)
Chiche, Cebes Construction, Bayshore)
Siding and Flooring, Sebastio Luiz De)
Araujo, and John Does 1 – 4,)

Fourth-Party Defendants.)
_____)

Alpha Omega Construction Group, Inc.)

Fourth-Party Plaintiff,)

Vs.)

Garcia Roofing, LLC, Juan Garza Ramos,)
Jose Vera, and Espino Roofing, LLC,)
Fourth-Party Defendants.)

DVS, Inc.,)
Fourth-Party Plaintiff,)

Vs.)

Sousa Construction, LLC, Lima)
Construction, LLC, N&B Construction,)
LLC, Itatiaia Construction, LLC and JC)
Contractors, LLC)
Fourth-Party Defendants.)

South Carolina Exteriors, LLC.)
Fourth-Party Plaintiff,)

Vs.)

Juan Garza Ramos, d/b/a Juan)
Constructors,)
Fourth-Party Defendant.)

Guaranteed Framing, LLC)
Fourth-Party Plaintiff,)

Vs.)

First Construction, LLC, JC Contractors,)
LLC, Jessica Marroquin d/b/a)
Marroquin Construction, and Unique)
Framing, LLC,)
Fourth Party Defendants.)

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This matter came before the Court on April 11, 2018 for a hearing upon Plaintiffs' Patricia Damico, et al. ("Plaintiffs") Motion to Lift Automatic Stay pursuant to Rule 241(c)(1), SCACR. Present for Plaintiffs was John Hayes, IV, Esq. and present for Defendant Lennar Carolinas, LLC was James Werner, Esq. Upon review of the memoranda and materials presented, oral arguments, and the applicable rules and case law, Plaintiffs' Motion to Lift the Automatic Stay is granted solely for discovery purposes.

FACTUAL AND PROCEDURAL BACKGROUND

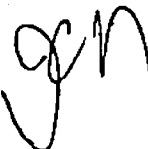
The case involves allegations of construction defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The development consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development. In 2011, the development was sold to Defendant Lennar Carolinas, LLC, hereinafter "Lennar", who took over the control, construction, management, and sale of the homes at The Abbey.

Plaintiffs filed this lawsuit on October 30, 2014 against multiple defendants, including Lennar alleging causes of action for Negligence, Negligent Misrepresentation, Breach of Warranties, Breach of Fiduciary Duties, and Unfair Trade Practices. Plaintiffs subsequently moved for class certification and filed an Amended Complaint on March 24, 2016. On March 30, 2016 Lennar filed a Motion to Compel Arbitration pursuant to their Arbitration Agreements with some but not all of the Plaintiffs. The Motion to Compel Arbitration was denied and Lennar appealed the decision. The appeal prompted an automatic stay, which gave rise to Plaintiffs' Motion to Lift the Automatic Stay for purposes of discovery. Plaintiffs argued the parties should

be permitted to conduct discovery while the appeal is pending because discovery is not affected by the appeal. Lennar argued the automatic stay should not be lifted.

STANDARD OF REVIEW

Pursuant to Rule 205, SCACR, the entire case is not stayed during the pendency of the appeal. This allows the lower court to retain jurisdiction over matters not affected by the appeal. The Rules also allow any party to move the Court to lift the automatic stay imposed by an appeal. SCACR 241(C)(1). The moving party bears the burden of demonstrating that the automatic stay should be lifted. Rule 241(c)(1) states that the court may consider issues such as mootness and jurisdiction when deciding whether to lift an automatic stay. However, these issues are not exhaustive and the Court can act on its own discretion when removing the stay.

 In *Cousar v. New London Engineering Co., Inc.*, the Supreme Court held that retaining jurisdiction over discovery matters during pendency of appeal from order denying motion to amend answer and third-party complaint was not an abuse of discretion because discovery was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Further, under *Williams v. Borden's Inc.*, this Court has the power to control its order of business and safeguard the rights of the litigants before it. *Williams v. Borden's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

ANALYSIS

I. THE COURT CAN PROCEED WITH MATTERS NOT AFFECTED BY THE APPEAL.

Plaintiffs have multiple claims against subcontractors that are not subject to any arbitration agreements. Pursuant to Rule 205, SCACR, "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 205, SCACR. The

Supreme Court has held that retention of jurisdiction over discovery matters by the trial court was not an abuse of discretion and that discovery in that case was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Based on the Appellate Court Rules and Supreme Court precedent presented by the Plaintiffs, it is within the powers of this court to retain jurisdiction over discovery matters and allow the case to progress.

Accordingly, this Court finds that matters relating to the claims against subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. In addition, any Homeowner Plaintiff who is not an original purchaser from Lennar has no arbitration agreement with Lennar. Therefore, the decision that has been appealed bears no relation to the claims between the subcontractors and the Plaintiffs. As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors.

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II. THE AUTOMATIC STAY IS LIFTED FOR PURPOSES OF DISCOVERY

During the pendency of an appeal, a party may move the Court to lift the automatic stay for any purpose. SCACR 241(c)(1). While Rule 241 states the court should consider issues relating to jurisdiction and mootness, this list is not exhaustive and the Court has broad discretion in deciding such matters. SCACR(c)(2); *Cousar*, 306 S.C., 410 S.E.2d.

Lennar cites to a federal case in an attempt to show the lifting of the stay is improper because the appeal is not "frivolous". *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). The issue before the Court is not whether the appeal is frivolous but whether the Automatic Stay should be lifted to allow discovery to continue. The Court agrees with Defendant that there is an automatic stay placed on the case

and it will remain until the Court of Appeals renders a decision. However, as allowed by the Appellate Court Rules, any party may move the court to lift the automatic stay and Plaintiffs have brought their motion accordingly.

Plaintiffs assert that discovery is not affected by the appeal, that Plaintiffs would be prejudiced by a delay in discovery, and that regardless of which forum the Court of Appeals chooses for this matter, some form of discovery is allowed to take place. The Court finds it compelling that under the arbitration rules, discovery still needs to take place. The agreement between Plaintiffs and Lennar contains an Arbitration Clause that incorporates the AAA Residential Construction Arbitration Rules. The AAA rules allow for the exchange of documents and interviews. ARB-22. This equates to what is commonly known in litigation as discovery and depositions. The AAA rules further allow for expert reports and the exchange of any expert reports and estimates. *Id.* In the event that the Appellate Court enforces the arbitration agreements between the parties, there will be discovery conducted. The Court sees no reason to needlessly delay events that would occur eventually, regardless of the forum.

Lennar's argument relies heavily on a 2006 Circuit Court Order in *Chassereau* that states that allowing discovery during the appeal was improper in that case. The Court in *Chassereau* decided that "[p]ermitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*" *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626. The basis for the Court's decision in

Chassereau was emphasized by the Court, and that basis was that there was no arbitration agreement providing for discovery. Here, we have the opposite set of facts and the underlying arbitration agreement in this case *does* address discovery and even provides the applicable rules. In addition, there are no arbitration agreements between the Plaintiffs and Subcontractor Defendants. The Supreme Court decision in *Cousar* outweighs the trial court order in *Chassereau*. Although *Chassereau* is persuasive, it is not binding upon the Court and the pertinent facts in this case differ from *Chassereau*.

Plaintiffs also argued that as time passes by in this case, which was filed in 2014, witnesses' memories will lapse, the hazardous conditions present at the Abbey will worsen, properties will continue to deteriorate, insurance coverage will diminish, and Plaintiffs will be prejudiced as a result. The passing of time and rising expenses make it clear that allowing discovery to move forward in this case would promote the interests of judicial economy and equity. Plaintiffs have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery. Alternatively, the Court finds that delaying discovery would prejudice Plaintiffs. Accordingly, the Court hereby lifts the stay solely for purposes of discovery.

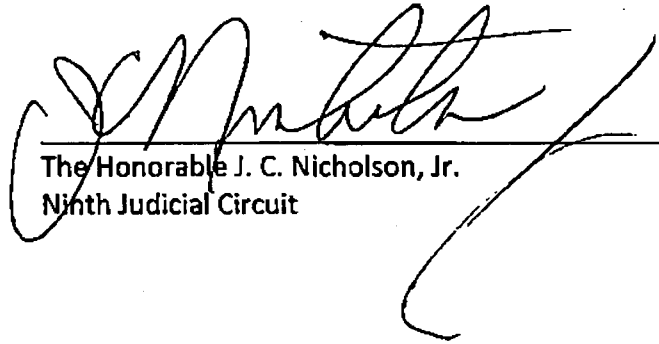
CONCLUSION

Based on the foregoing and it being within the sound discretion of the Court to control its order of business and safeguard the rights of the litigants before it, this Court finds there is sufficient evidence demonstrating the need for discovery to continue and that the automatic stay imposed by SCACR 205 should be lifted solely for discovery.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion to Lift the Automatic Stay is granted for discovery to take place.
2. Plaintiffs and Defendants are entitled to engage in discovery in the above-captioned matter.
3. The Stay shall remain in place otherwise for matters affected by the appeal.

AND IT IS SO ORDERED.



The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

May 29 2018
Moncks Corner, South Carolina