

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

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Degg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

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,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries 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, Decor 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,

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SC Court of Appeals

Of which Volkmar Consulting Services, 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, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, 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.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S RETURN TO APPELLANT'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING AUTOMATIC STAY

Pursuant to Rule 240(e), SCACR, Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara; Matthew Collins, Jonathan and Theresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow (collectively, "Homeowners") hereby respond to the Petition to Review the Circuit Court's Order Lifting the Automatic Stay filed by Appellant Lennar Carolinas, LLC ("Lennar"). Because discovery is not affected by the pending appeal and the circuit properly exercised its discretion in lifting the automatic stay, Lennar's petition should be denied.

FACTS

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

Since the construction of the homes at The Abbey, Homeowners have discovered severe defects in their homes. Homeowners' investigations have revealed significant design and construction defects, including but not limited to improper soil grading, improper drainage, and structural defects resulting in hazardous structural deterioration. Because the defects are so severe, the grading structures and drainage must be completely redone to fix the harm.

PROCEDURAL BACKGROUND

Homeowners filed this lawsuit on October 30, 2014, alleging causes of action for negligence, negligent misrepresentation, breach of warranties, breach of fiduciary duties, and unfair trade practices against multiple defendants, including Lennar. Homeowners filed an Amended Complaint on March 24, 2016, and subsequently moved for class certification.

On March 30, 2016, Lennar filed a Motion to Compel Arbitration pursuant to arbitration agreements it had with some but not all of the Homeowners. On September 21, 2016, Lennar's Motion to Compel Arbitration was denied. On November 18, 2016, Lennar served a Notice of Appeal related to the order denying its Motion to Compel Arbitration. On November 29, 2016, Lennar filed a Motion to Enforce Stay with the South Carolina Court of Appeals. On December 9, 2016, the Court of Appeals issued an order finding that (1) the order denying Lennar's Motion

to Compel Arbitration was immediately appealable and (2) all matters affected by the appeal were stayed during the pendency of the appeal.

On February 27, 2018, Homeowners filed a Motion to Lift the Automatic Stay for Purposes of Discovery.¹ On May 31, 2018, the circuit court entered an order granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery.² Pursuant to Rule 241(d)(2), SCACR, Lennar now seeks review of the circuit court's order granting Plaintiff's Motion to Lift Automatic Stay for Purposes of Discovery.

STANDARD OF REVIEW

Pursuant to Rules 205 and 241, SCACR, the lower court retains jurisdiction over matters not affected by an appeal. "Nothing in these rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The circuit court's decision to retain jurisdiction over a matter that is not affected by the appeal is reviewed by this court for an abuse of discretion. *See, e.g., Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991) (concluding that the circuit court did not abuse its discretion in retaining jurisdiction over discovery matters during the pendency of an appeal).

In addition, Rule 241(C)(1), SCACR, permits any party to move before the lower court to lift the automatic stay imposed by an appeal. The decision to stay a case or lift a stay is within the sound discretion of the circuit court. *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007). Accordingly, the appellate court reviews the circuit court's decision to lift the automatic stay under the abuse of

¹ A copy of this motion is attached as **Exhibit A**.

² A copy of this order is attached as **Exhibit B**.

discretion standard. *Id.*

ARGUMENT

A. Discovery is not affected by the pending appeal.

As a preliminary matter, discovery is unaffected by the pending appeal. Because discovery will take place whether the case proceeds before the circuit court or in the arbitration forum identified in the allegedly applicable arbitration agreements, the matter of discovery is not affected by Lennar's pending appeal and therefore can continue to be conducted while the appeal is pending. Accordingly, the circuit court can and should retain jurisdiction over discovery during the pendency of the appeal.

Under both Rules 205 and 241, SCACR, the lower court retains jurisdiction over all matters that are not affected by the appeal. See Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.").

In the order lifting the stay, the circuit court considered this issue and found that some matters before the court were unaffected by Lennar's appeal. In that regard, the circuit court found that because there were "no contracts or binding arbitration agreements" between the Homeowners and subcontractor defendants, Homeowners' claims against the subcontractors were not affected by the appeal. Accordingly, the circuit court found that Homeowners were "free to conduct discovery and move their case forward as to the subcontractors." Homeowners agree with the circuit court's analysis as to its claims against the subcontractor defendants and would further argue that because discovery is provided for under the rules cited in the allegedly

applicable arbitration agreements, all discovery in this case is unaffected by the appeal and should be permitted to proceed.

During its analysis for lifting the stay, the circuit court properly noted that discovery will still take place under the arbitration rules. The agreement between Homeowners and Lennar contains an arbitration clause that incorporates the AAA Residential Construction Arbitration Rules. These rules allow for both the exchange of documents and recorded interviews of witnesses and experts. ARB-22. The AAA rules also allow for the exchange of expert reports and estimates. *Id.* The AAA rules also require both parties to exchange certain information, including a witness list and a written summary of each witness's expected testimony. *Id.* While the technicalities of these rules may slightly differ, the underlying substance is the same. The circuit court saw "no reason to needlessly delay events that would occur eventually, regardless of the forum." Accordingly, discovery is not affected by the appeal and the lower court should retain jurisdiction over the case for this limited purpose of discovery.

Contrary to Lennar's position in the petition, the 2006 circuit court order in *Chassereau v. Global Sun Pools, Inc.*, 2006 WL 6087626 (S.C. Com. Pl. March 29, 2006) is factually distinguishable from the current action and therefore inapplicable to the current case. In that case, Justice Few, then sitting as a circuit court judge, found that allowing discovery during the appeal of a motion to compel arbitration was improper under the facts before the court. *Id.* Specifically, the court in *Chassereau* noted that:

Permitting 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.*

Id. (emphasis in original). Unlike the arbitration agreement in *Chassereau*, the arbitration agreement in this case *does* address discovery and provides for numerous forms of discovery to take place, including the production of relevant documents, exchanging of expert reports, and the equivalent of depositions for both fact and expert witnesses. The rules adopted in the arbitration agreement permit for substantially the same discovery mechanisms as permitted under the South Carolina Rules of Civil Procedure. Accordingly, the concerns contained in *Chassereau* regarding the possible tactical advantage that could be enjoyed by a party that was given access to discovery which was not otherwise authorized is inapplicable to the instant case. Homeowners and defendants will simply be permitted to continue to conduct discovery to which they will be entitled regardless of the forum. For this reason, the court's reasoning in *Chassereau*--an unpublished circuit court opinion--does not apply.

Because discovery is permitted in both forums this issue is unaffected by the appeal and discovery should be permitted to continue while the appeal is pending.

B. The circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery.

The decision to lift the automatic stay was within the sound discretion of the circuit court and this Court should not disturb that decision absent an abuse of discretion. The circuit court did not abuse its discretion in determining that it was in the parties' best interest to lift the automatic stay and permit discovery to continue.

During the pendency of an appeal, any party may move the lower court to lift the automatic stay. Rule 241(c)(1), SCACR. While Rule 241 states that the lower court should consider issues relating to jurisdiction and mootness, Rule 241 does not limit the court's review to solely these two factors. Rule 241(c)(2), SCACR. Moreover, the circuit court has broad

discretion deciding whether to lift a stay and the decision to lift a stay will only be overturned where there is an abuse of discretion. See, e.g., *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007) (reviewing a circuit court's decision to lift a statutory automatic stay in a condemnation action and noting that because the circuit court has discretion over the imposition and lifting of stays, "the appropriate standard of review [for such a decision] is abuse of discretion"). This is consistent with the circuit court's inherent power to control the order of its business to safeguard the rights of litigants." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

The purpose of Rule 241 is to provide litigants with the opportunity to seek relief from the rigid application of an automatic stay, which is exactly what took place in this case. In Homeowners' motion to lift the automatic stay, Homeowners provided the circuit court with numerous reasons why it was in the parties' best interests for the court to lift the automatic stay. The circuit court conducted a thorough analysis as to whether the automatic stay should be lifted. The circuit court carefully considered the arguments from both parties and the practical implications of lifting the stay. It weighed the potential prejudices faced by both parties if the court were to lift the stay or to allow the stay to remain in place. After performing a thorough analysis, the circuit court concluded that the parties were best served by lifting the automatic stay and permitting discovery to proceed.

Because the circuit court did not abuse its discretion in deciding to lift the automatic stay, this Court should affirm this decision.

- (1) The circuit court properly determined delaying discovery would likely result in prejudice to the Homeowners.**

This case was filed in 2014, a year and a half prior to the filing of the present Motion to

Compel Arbitration. With any additional delay comes the increased risk of valuable information and evidence being lost, destroyed, or tampered with before trial. The likelihood of spoliation of evidence increases as the case is pending on appeal, awaiting oral argument and a decision. As time continues to pass, witnesses' memories lapse, the hazardous conditions present at The Abbey worsen, the properties continue to deteriorate, and insurance coverages diminish. All of this results in prejudiced to Homeowners.

Moreover, due to the nature of Homeowners claims in this action, there is a need to expediently resolve this dispute. Homeowners are living in extremely hazardous conditions that will only continue to worsen if the case is further delayed by leaving the stay in place. In support of the motion to lift the stay, Homeowners addressed many of the construction defects plaguing the development. The foundations of the homes are cracking and sinking into the earth, creating health and safety concerns for the homeowners. Massive cracks extend from the ceiling to the floor of the homes. These cracks are expanding daily and require urgent repair. Pieces of drywall are falling from the walls and ceilings due to the expanding cracks. Cracks are extending into electrical outlets and light fixtures making them unsafe to use. Floors are cracking and causing insect infestation requiring immediate extermination. Counters in bathrooms and kitchens are separating from the walls.

If the stay is left in place, Homeowners will be forced to continue to live in these hazardous conditions. In addition, there is a risk that these conditions will continue to deteriorate, exposing Homeowners to greater harm. The sooner this case is resolved, the sooner Homeowners will be able to make the necessary repairs that will make their homes safe and livable. By lifting the automatic stay, Homeowners avoid the prejudice that results from further unnecessary delay, including the increased safety concerns arising from further deterioration of

the structures. In addition, if discovery is further delayed, the parties may lose the opportunity to examine the defects if Homeowners are somehow able to afford repairs to their homes.

For these reasons, the circuit court exercised its sound discretion in determining that the Homeowners would be prejudiced were the automatic stay not lifted for purposes of discovery.

(2) The circuit court properly concluded that neither party will be prejudice by lifting the stay for discovery.

Lifting the automatic stay for the sole purpose of permitting discovery would not prejudice either party. To the contrary, as the circuit court noted, permitting discovery would allow the parties to gather and analyze time-sensitive information—information which could otherwise be lost, destroyed, or tampered with if the automatic stay were not lifted. By delaying discovery, all parties face the increased risk that witnesses will be unable to recall important facts that are currently fresh in their memories or that key witnesses may be rendered incapacitated due to illness or death.

Contrary to what Lennar argues, discovery will not be any more costly or time consuming if permitted to continue before the circuit court, including discovery on Homeowners' class claims. Lennar's arguments are unavailing for several reasons.

First, Lennar does not offer a single example of how discovery related to class claims would be any more expensive or time consuming than pursuing discovery for individual claims. Due to the nature of this litigation, discovery for the class claims would likely be far less expensive than proceeding with separate discovery for individual plaintiffs. Because every member of the proposed class is a homeowner in the same development, the scope of discovery for individual claims would almost entirely overlap with the one another. Separate discovery would be far more likely to result in duplicative, repetitive discovery and increased costs.

Second, permitting discovery would promote the interests of judicial economy and

equity. Discovery would allow the parties to better evaluate the strengths and weakness of their respective cases, lead to possible resolution of this matter as more facts and information are discovered, and would allow the parties to avoid surprises during trial that could further prolong litigation. Even if arbitration is compelled and the Homeowners cannot proceed as a class, the discovery conducted while the appeal is pending will still be applicable to the individual cases that will continue in the arbitration forum, permitting these cases to be resolved more expediently and less expensively.

Finally, Lennar's argument on this issue, including its argument concerning Homeowners' class claims, was presented to the circuit court in both Lennar's briefs and at the hearing on the motion to lift the stay. Even after considering these arguments, the court found "[Homeowners] have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery." Because this decision falls within the sound discretion of the circuit court, this court should affirm the circuit court's finding in this regard.

(3) Lennar's reliance on federal case law concerning divestment of a trial court's jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration is flawed due to the procedural differences between state and federal court.

In support of its contention that the circuit court should be divested of jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration, Lennar largely relies federal case law. However, the cases relied upon by Lennar have important procedural mechanisms that differ from those provided in South Carolina state courts. Specifically, federal courts offer a safeguard against a party who files an appeal for purposes of delaying or otherwise disrupting litigation. Federal courts permit a party who contests an appeal on an order denying arbitration to seek certification of the appeal as "frivolous" or "forfeited." For example, in *Levin v. Alms & Assocs., Inc.*, the Fourth Circuit addressed the necessity for this

procedural safeguard, stating “it would be inadvisable to ‘allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.’” 634 F.3d 260, 265 (4th Cir. 2011) (quoting *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990)). “For this reason, each of the circuits adopting the majority view [of divestiture] has created a frivolousness exception to the divestiture of jurisdiction.” *Id.* The Tenth Circuit elaborated on the mechanics of the frivolousness exception as follows:

[U]pon the filing of a motion to stay litigation pending an appeal from the denial of a motion to compel arbitration, the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited. That certification will prevent the divestiture of district court jurisdiction.

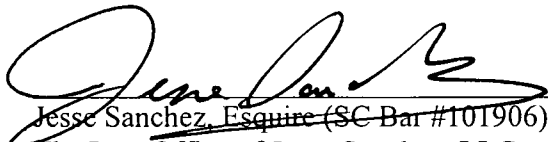
McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162 (10th Cir. 2005).

South Carolina state courts lack an equivalent safeguard mechanism, which would permit a party to seek permission from the court to proceed with discovery if it felt another party were pursuing an appeal solely for purposes of delay. If this Court adopts the federal standard, as Lennar suggests, and holds any appeal of a motion to compel arbitration automatically divests the lower court of jurisdiction over discovery, litigants will be forced to idly wait while appeals are processed without being afforded the necessary safeguards.

The South Carolina Appellate Rules already provide a mechanism for a party who wants to continue discovery during the pendency of an appeal. Specifically, Rule 241(c)(1), SCACR permits a party to move the Court to lift an automatic stay during the pendency of an appeal. This is precisely what happened in the present case. After considering arguments from both parties, the circuit court exercised its sound discretion in determining that the automatic stay imposed by Lennar’s pending appeal should be lifted for the sole purpose of discovery.

CONCLUSION

Homeowners respectfully request that this Court affirm the ruling of the circuit court Order Granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery. Discovery is not affected by the appeal and the arbitration agreements that Lennar seeks to enforce permit discovery. Because discovery is unaffected by the appeal, the circuit court can and should retain jurisdiction over discovery while the appeal is pending. In addition, the circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery. Prohibiting discovery while the appeal is pending will result in prejudice to the Homeowners. In contrast, proceeding with discovery does not result in prejudice to Lennar. Accordingly, the circuit court's order should be affirmed.



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June 21, 2018
Charleston, South Carolina