

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
JUN 28 2018
SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, 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,
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, 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,

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, Isidru Mejia, Juan Perez, 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.

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

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Attorneys for Appellant Lennar Carolinas, LLC

Appellant Lennar Carolinas, LLC (“Lennar”), by and through undersigned counsel, respectfully submits this Reply to Respondents’ Return to Lennar’s Petition to Review the Circuit Court’s Order Lifting the Automatic Stay.

I. The circuit court’s order lifting the automatic stay is void for a lack of jurisdiction because the circuit court’s order ruled on matters directly affected by Lennar’s appeal of the arbitrability issues.

The controlling question before the Court is whether discovery in the underlying case is affected by Lennar’s appeal of the circuit court’s refusal to compel the entire action to arbitration. Respondents contend that the Court should review the circuit court’s finding that discovery is not affected by Lennar’s appeal for an abuse of discretion. Respondents’ contention is utterly incorrect and without basis.

If discovery in this case is affected by Lennar’s appeal, then the circuit court does not have jurisdiction to issue an order allowing discovery to proceed. *See* Rule 205, SCACR. Whether the circuit court has jurisdiction is a question of law, and this Court is “free to decide questions of law with no deference to the [circuit] court.” *Chew v. Newsome Chevrolet Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Thus, the question of whether discovery may proceed while the appeal of the arbitration issues is pending is a question of law – not the circuit court’s discretion.

Respondents cite the decision in *Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 367 S.C. 141, 151, 625 S.E.2d 227, 232 (Ct. App. 2006), *cert. granted, decision rev’d sub nom, Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 373 S.C. 96, 644 S.E.2d 681 (2007), and *overruled by Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006), for the proposition that the circuit court’s decision to lift the stay in this case is a matter within the sound discretion of the circuit

court. The decision in *Carolina Water Service* supports no such proposition and is utterly inapplicable to this case.

Respondents misrepresent that the court in *Carolina Water Service* was “reviewing a circuit court’s decision to lift a statutory automatic stay.” The court in *Carolina Water Service* did not review a decision to lift a statutory automatic stay or an automatic stay under Rule 205, SCACR. In *Carolina Water Service*, the Lexington County Joint Municipal Water & Sewer Commission (the “Joint Commission”) initiated a condemnation action to acquire certain facilities owned by Carolina Water Service, Inc. (“Carolina Water”) and Utilities, Inc. (“Utilities”). *Carolina Water Serv.*, 367 S.C. at 145, 625 S.E.2d at 229. In response to the Joint Commission’s action, Carolina Water, Utilities, and the Town of Lexington filed actions challenging the Joint Commission’s right to pursue the condemnation proceeding (the “Challenge Actions”). *Id.* Carolina Water then sought a statutory stay of the condemnation proceedings and the circuit court issued an Order granting the statutory stay. *Id.* The circuit court also imposed a discretionary stay of the Challenge Actions pending the resolution of a related case in the South Carolina Administrative Law Court. *Id.* Subsequently, the circuit court issued an order lifting the discretionary stay of the Challenge Actions; however, the statutory (automatic) stay of the condemnation action remained intact. *Id.* at 151, 625 S.E.2d at 232 (“[T]he order lifting the stay in this case did not purport to disturb the statutory [automatic] stay on the condemnation proceeding, but dissolved the [discretionary] stay only as to the Challenge Actions.”). On appeal, the court reviewed the circuit court’s decision to lift the discretionary stay for an abuse of discretion. The court did not review the issuance or enforcement of the statutory automatic stay. Therefore, Respondents’ argument that the Court should apply the same standard of review and analyze the issue of whether the circuit court had the authority to issue an order permitting discovery to proceed for an abuse of discretion fails.

II. The circuit court's order must be vacated on the grounds that the issue of the discovery that is ultimately allowed in this case, and from whom, is a matter inextricably intertwined with the resolution of the pending appeal.

Respondents' contention that discovery should proceed in the case because such discovery will be inevitably allowed in the arbitration is disingenuous. Respondents argued, and the circuit court previously ordered, that there was no enforceable arbitration agreement applicable in this case. Now, Respondents' argument is based upon a finding that the Purchase and Sale Agreement, and the arbitration rules therein, will apply to an eventual arbitration. Respondents' argument ignores the terms of the other applicable arbitration agreements and the rules that would govern the arbitration if the Court compels Respondents to arbitration pursuant to any of those agreements.

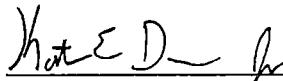
The arbitration agreement that will govern the future arbitration in this case and, therefore, which set of arbitration rules might apply, is a central issue in the appeal. There is no basis for the circuit court to make that determination now, and a decision based on that determination is improper and must be vacated.

The Purchase and Sale Agreement provides for the application of the American Arbitration Association's Residential Construction Arbitration Rules; however, the Lennar Limited Warranty—an agreement through which the Court may also compel arbitration—provides for use of the American Arbitration Association's Construction Industry Arbitration Rules. Respondents, and the circuit court, seek to justify their position that discovery should proceed while Lennar's appeal is pending on the grounds that the future arbitration would be governed by the American Arbitration Association's Residential Construction Rules. The determination of which rules will govern the arbitration is a matter directly affected by the appeal.

Respondents, and the circuit court, incorrectly state that the American Arbitration Association's Residential Construction Arbitration Rules provide for depositions of both fact and expert witnesses. In truth, the Residential Construction Arbitration Rules of the American Arbitration Association provide only that parties to the arbitration and expert witnesses may be "interviewed." Those rules do not expressly provide for depositions on the record and they provide for no discovery of non-party fact witnesses, just as they provide no opportunity for interrogatories or requests to admit. The determination as to the ultimate parties to the arbitration in this case is, again, an issue that is pending appeal. Therefore, the parties who may be available for interviews under the American Arbitration Association's Residential Construction Arbitration Rules is a matter unknown and undeterminable at this time. Discovery that is allowed to proceed while the Court considers which parties must be compelled to arbitration is prejudicial and unwarranted. Therefore, the circuit court's order must be vacated and discovery should not be permitted to proceed because the issue of what discovery is ultimately allowed, and from whom, is a matter inextricably bound up in the pending appeal. *See Arnal v. Fraser*, 371 S.C. 512, 521, 641 S.E.2d 419, 424 (2007) (holding a family court order terminating a father's visitation rights was void for a lack of subject matter jurisdiction on the ground that the issue was affected by the pending appeal).

CONCLUSION

Lennar respectfully requests the Court issue an order vacating the circuit court's Order Lifting the Automatic Stay on the grounds that the circuit court lacked the jurisdiction to issue an order permitting discovery in the underlying action to proceed while Lennar's appeal is pending before the Court.



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June 28, 2018
Columbia, South Carolina

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APPEAL FROM BERKELEY COUNTY
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J.C. Nicholson, Jr., Circuit Court Judge

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Respondents,

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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.

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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.

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PROOF OF SERVICE

The undersigned hereby certifies that on June 28, 2018, a copy of the foregoing **APPELLANT LENNAR CAROLINAS, LLC'S REPLY TO RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S RETURN TO LENNAR CAROLINAS, LLC'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING THE AUTOMATIC STAY** was served on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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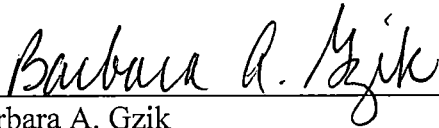
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June 28, 2018

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
JUN 28 2018
SC Court of Appeals

Re: *Patricia Damico, et al. v. Lennar Carolinas, LLC, et al.*
Case No. 2014-CP-08-2424; Appellate Case No. 2016-2339

Dear Mrs. Kitchings:

Enclosed for filing please find the original and a copy of Appellant Lennar Carolinas, LLC's Reply to Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow's Return to Lennar Carolinas, LLC's Petition to Review, the Circuit Court's Order Lifting the Automatic Stay and a Proof of Service, regarding the above-entitled matter.

Please file the original with the Court and return a file-stamped copy with our courier. By copy of this letter, I am serving opposing counsel with a copy of same.

With kindest regards,

Sincerely,

A handwritten signature in cursive script that reads "Katon E. Dawson, Jr.".

Katon E. Dawson, Jr.

KED:bg

cc: Counsel of Record (via U.S. Mail)

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