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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

RECEIVED
AUG 14 2018
SC Court of Appeals

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 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, 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,

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' PETITION FOR FULL APPELLATE COURT REVIEW
OF DECISION**

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Pursuant to Rule 241(d)(2) and Rule 241(d)(7), 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 respectfully petition the full appellate court for review of the Court of Appeals *Order* entered on July 30, 2018 (the “Subject Order”).¹ The Subject Order effectively reverses the *Order Granting Plaintiffs’ Motion to Lift Automatic Stay for Purposes of Discovery* entered on May 31, 2018 by the Honorable J.C. Nicholson, Jr.²

Homeowners respectfully submit that the Court’s conclusion set forth in the Subject Order was reached in error and should be vacated for those reasons set forth in *Respondents’ Return to Appellant’s Petition*, dated June 21st, 2018.³ Homeowners hereby incorporate *Respondents’ Return to Appellant’s Petition* and the arguments contained therein by reference. In addition, the Subject Order should be vacated for the following reasons:

1. The Subject Order fails to apply the requisite “abuse of discretion” standard of review.

In reaching its determination, the Subject Order fails to apply the “abuse of discretion” standard of review to the circuit court’s *Order Granting Plaintiffs’ Motion to Lift Automatic Stay for Purposes of Discovery*. While determinations of arbitrability are subject to *de novo* review, the decision to stay a case or lift a stay is within the sound discretion of the circuit court. *See, e.g., Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm’n*, 367 S.C.

¹ A copy of this Order is attached as Exhibit A.

² A copy of this Order is attached as Exhibit B.

³ A copy of the Respondents’ Return is attached as Exhibit C. The Return argues, *inter alia*, that the lower court properly retained jurisdiction over discovery; that the Circuit Court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery; and that procedural differences between state and federal courts make the federal cases cited by Lennar (and now the Court) inapplicable to the present matter.

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). See also, *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).

It was an error of law for the Court to reach its determination without applying the “abuse of discretion” standard of review to the circuit court’s order. As set forth in *Respondent’s Return to Appellant’s Petition*, the circuit court did not abuse its discretion in retaining jurisdiction over discovery and lifting the automatic stay for purposes of discovery.⁴ Accordingly, the Subject Order should be vacated.

In addition, discovery is not a matter affected by the underlying appeal. As the circuit court noted, there are no arbitration agreements to enforce between Homeowners and any of the defendant subcontractors because no agreements (arbitration or otherwise) were signed between Homeowners and the defendant subcontractors:

[T]his Court finds that matters relating to the claims against the 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

⁴ See Arguments A and B on pages 5-12 of *Respondents’ Return to Appellant’s Petition* (attached herein as Exhibit C) for a detailed discussion on how the circuit court exercised its sound discretion in lifting the automatic stay for purposes of discovery.

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. (Order at p. 6, attached herein as Exhibit B).

Accordingly, it was an error of law to divest the circuit court of jurisdiction as to discovery because discovery between the Homeowners and the defendant subcontractors is not a matter affected by the underlying appeal.

The circuit court also properly determined that discovery between the Homebuilders and Lennar is not affected by the underlying appeal because discovery would occur regardless of whether this case is tried or arbitrated. The circuit court noted:

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 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 the [sic] the 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.⁵

Accordingly, it was an error of law to divest the circuit court of jurisdiction as to discovery because it is not a matter affected by the underlying appeal.

2. The Subject Order's application of *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) to the present case was an error of law because the cases are factually and procedurally distinguishable.

⁵ See also Argument A. on p. 5 of *Respondents' Return to Appellant's Petition* (attached herein as Exhibit C) for a detailed discussion on the availability of discovery in the event arbitration were enforced.

The Subject Order cites *Stokes* in support of divesting the circuit court of jurisdiction over discovery matters. However, *Stokes* is distinguishable from the present case in several ways and is consequently inapplicable.

In *Stokes*, the Court of Appeals stayed discovery because it first determined that all of Plaintiff's causes of action were subject to arbitration and that the Federal Arbitration Act (FAA) applied to the underlying employment agreement. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711 (Ct. App. 2002) (“Having determined that Stokes’ trespass and conversion actions are subject to arbitration, we next turn to the issues of the automatic stay and the trial court's order to compel discovery.”) Unlike the Court in *Stokes*, this Court has not determined that any causes of action against Lennar or the various defendant subcontractors are subject to arbitration, nor has this Court determined that the FAA has any bearing on this matter. Accordingly, it was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because this Court has not made a determination that all of Homeowners’ claims are subject to arbitration or that the FAA is applicable.

In addition, the Court in *Stokes* based its determination on the applicability of the FAA to the underlying employment agreement. The parties in *Stokes* did not dispute that the FAA applied to claims arising under the subject employment agreement. *Stokes*, 351 S.C. at 610. (“Neither party disputes the FAA applies to claims arising under the Form U-4 Stokes signed in 1992.”) In the present case, Homeowners dispute that the FAA applies to their claims against Lennar and the defendant subcontractors. (See *Respondent’s Final Brief* at p. 13, noting, “The Circuit Court properly determined that, in the alternative to being unconscionable, the arbitration provisions are ambiguous and not governed by the FAA.”) Accordingly, it was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because this

Court has not made a determination that the Homeowners' claims are subject to the FAA.

Further, even if the FAA were to apply, the FAA does not require the parties to arbitrate where they have not agreed to do so. The Court in *Stokes* noted this much, stating:

“‘[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement.’ *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 591-592, 553 S.E.2d at 116 (citation omitted). The FAA ‘simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.’ Volt, 489 U.S. at 478, 109 S.Ct. 1248. *Stokes*, 351 S.C. at 611.

In the instant case, **no agreements (arbitration or otherwise) were signed between the Homeowners and the defendant subcontractors.**⁶ Accordingly, it was an error of law to divest the circuit court of jurisdiction as to the claims between the Homeowners and the defendant subcontractors because the Homeowners and the defendant subcontractors have not agreed to arbitrate their claims. The circuit court had jurisdiction over discovery and exercised sound discretion in permitting discovery to proceed as to the Homeowners' claims against the subcontractors.

Also unlike *Stokes*, this Court has not made a determination that enforceable arbitration agreements exist between the Homeowners and Lennar. Even if the Court determines that enforceable arbitration agreements exist, discovery would be permitted under the arbitration rules propounded by Lennar.⁷

The forgoing distinctions render *Stokes* inapplicable to the present case. It was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because *Stokes* is factually and procedurally distinguishable from the present case. Accordingly, the

⁶ See Argument 1, *supra*.

⁷ See Argument 1, *supra*.

Subject Order should be vacated.

3. The Subject Order relies on *federal* case law that is inapplicable to the present matter due to substantive differences between state and federal procedural rules.

The Subject Order cites *federal* case law to support the divestiture of jurisdiction in a *state* court case. *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011). The Subject Order disregards that federal courts, including the Fourth Circuit, have created a safeguard against improper divestiture of jurisdiction where a defendant files an appeal for purposes of delaying or otherwise disrupting litigation.⁸ In federal courts, an aggrieved party can immediately challenge the divestiture of jurisdiction caused by a defendant who appeals an order denying arbitration. See *Levin*, 634 F.3d at 265. The aggrieved party can immediately seek certification of the appeal as frivolous or forfeited. *Id.* **South Carolina state courts do not offer this safeguard.**

Indeed, the federal case cited by the Subject Order addresses the importance and necessity of this procedural safeguard. The Court in *Levin* noted:

As the Ninth Circuit noted in *Britton*, it would be inadvisable to “allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.” 916 F.2d at 1412. For this reason, each of the circuits adopting the majority view has created a frivolousness exception to the divestiture of jurisdiction. [...] 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. (Citing *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005)) *Levin*, 634 F.3d at 265.

⁸ See Argument 3 on p. 11 of *Respondents' Return to Appellant's Petition* (attached herein as Exhibit C) for a detailed discussion on the procedural differences between the federal and state court rules regarding divestiture of jurisdiction.

Again, South Carolina state courts do not offer an equivalent safeguard against improper divestiture of jurisdiction. It was an error of law to rely on federal case law to divest the circuit court of jurisdiction because the circuit court lacks the procedural safeguard afforded by the federal courts against improper divestiture of jurisdiction. Accordingly, the Subject Order should be vacated.

CONCLUSION

For the reasons stated hereinabove, this Court should vacate the *Order* entered on July 30, 2018. As more fully set forth in *Respondents' Return to Appellant's Petition*, discovery is not affected by the appeal. The arbitration agreements that Lennar seeks to enforce permit discovery. In addition, there are no agreements (arbitration or otherwise) between Homeowners and the defendant subcontractors. Because discovery is unaffected by the appeal, the circuit court can and should retain jurisdiction over discovery while the appeal is pending. 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 significant prejudice to the Homeowners. In contrast, proceeding with discovery does not result in prejudice to Lennar.

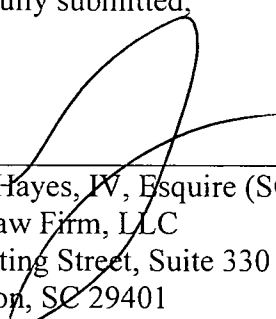
In addition, the Subject Order should be vacated because it fails to apply the "abuse of discretion" standard of review to the circuit court's *Order Granting Plaintiffs' Motion to Lift Automatic Stay for Purposes of Discovery*. The circuit court has broad discretion deciding whether to lift a stay and the decision to lift a stay will only be overturned where there is an abuse of discretion. The Subject Order should be vacated because it is an error of law to rely on *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) because *Stokes* is factually and procedurally distinguishable from the present case. Lastly, the Subject Order should also be vacated because it relies on federal case law that is inapplicable to state

court cases due to substantive differences between state and federal procedural rules.

[Signature on following page]

Respectfully submitted,

Respectfully submitted,



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August 13, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

RECEIVED

J.C. Nicholson, Jr., Circuit Court Judge

AUG 14 2018

SC Court of Appeals

Appellate Case No. 2016-2339

Case No. 2014-CP-08-2424

Patricia Damico and Lerna 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, 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,

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.

PROOF OF SERVICE

I, the undersigned, certify that I have served *Respondents' Petition for Full Appellate Court Review of Decision* to the attorneys of record by depositing a copy of it in the United States Mail on August 13, 2018, addressed to the following:

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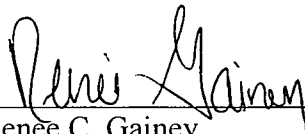
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August 13, 2018
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August 13, 2018

VIA USPS PRIORITY EXPRESS OVERNIGHT MAIL

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Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED

AUG 14 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 Ms. Kitchings,

Enclosed herewith, please find one (1) original and six (6) copies of *Respondents' Petition for Full Appellate Court Review of Decision and Proof of Service*.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the enclosed, please do not hesitate to contact me directly.

Sincerely,

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Cc: All Counsel of Record