

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-002277

American Star Development SC, LLC; KKMC Investments, LLC; and 211,
LLC..... Plaintiffs,

v.

PulteGroup, Inc.; Pulte Home Corporation, n/k/a Pulte Home Company, LLC;
and JW Homes, LLC. Defendants,

Of which American Star Development SC, LLC is the Appellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S VERIFIED
PETITION FOR AN ORDER LIFING THE AUTOMATIC STAY**

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February 4, 2019
Charleston, South Carolina

Appellant American Star Development SC, LLC (“American Star”) submits this return to the Verified Petition for an Order Lifting the Automatic Stay of Respondent Pulte Home Corporation, n/k/a Pulte Home Company, LLC (“Pulte”). Pulte has failed to present any grounds that would justify lifting the automatic stay under Rule 241, SCACR. Lifting the stay is not necessary to prevent the issue on appeal from becoming moot and could actually make it impossible for the Court to grant effectual relief to American Star. Additionally, Pulte is part of a publicly-traded national home building and mortgage company, and the relatively minor delays and monetary injuries alleged in its petition will not cause irreparable harm. Therefore, the Court should deny the petition and maintain the automatic stay to preserve the *status quo*.

FACTS

This appeal arises from a case involving a residential land development that American Star previously owned and sold. American Star’s underlying suit seeks specific performance of Pulte’s obligation to build an access road over Pulte’s residential development to American Star’s adjoining land as required under the purchase agreement. American Star further seeks a judicial declaration of its rights to future proceeds if the land is condemned pursuant to that same purchase agreement, which included a provision requiring American Star’s interest in future condemnation proceeds to be memorialized in a recorded instrument.

Because Pulte refuses to honor its obligations and to recognize American Star’s rights, American Star filed the underlying litigation. In connection with the litigation, American Star filed a *lis pendens*, providing notice to potential purchasers of homes in the development of its claims relating to the development. Pulte moved to cancel the *lis pendens*, and the circuit court granted that motion. This appeal followed, which stays the cancelation of the *lis pendens* during the appeal.

As a result of the automatic stay arising from the appeal, Pulte filed with the circuit court a motion to lift stay pursuant to Rule 241, SCACR. The circuit court denied that motion, concluding that lifting the stay would moot the issues on appeal.

STANDARD OF REVIEW

Under Rule 241(a), SCACR, the notice of appeal acts to automatically stay matters decided in the order on appeal. The purpose of the automatic stay is to “preserve the *status quo* pending the determination of the appeal or proceeding in error.” *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946). In determining whether to lift a stay arising from an appeal pursuant to Rule 241, “the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR.

ARGUMENT¹

I. Lifting the automatic stay is not necessary to prevent the issue on appeal from becoming moot.

Contrary to Pulte’s argument, lifting the stay is not necessary to prevent a contested issue from becoming moot. Regardless of how the Court ultimately resolves the appeal, its decision will have a practical, prospective legal effect on the past, present, and future validity of the *lis pendens* in question. Therefore, the Court should deny Pulte’s petition.

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). “A case becomes moot when judgment, if rendered, will have no

¹ Much of Pulte’s petition focuses on the merits of the underlying appeal and American Star’s relationship to the other plaintiffs. Yet Pulte fails to demonstrate any nexus between the grounds supporting its petition and the merits of the underlying appeal. For the sake of judicial economy, American Star will address the merits of the appeal in its subsequent briefs in accordance with the South Carolina Appellate Court Rules.

practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief.” *Id.* (internal quotation marks and citation omitted).

In this case, the issue on appeal is whether the circuit court erred in canceling the lis pendens. A lis pendens is a statutory mechanism for informing prospective purchasers or encumbrancers that a particular piece of property is subject to litigation. *See* S.C. Code Ann. § 15-11-10; *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 30, 336 S.E.2d 488, 491 (Ct. App. 1985). It notifies potential purchasers that litigation may affect their title to real property and that they will take such property subject to the judgment in the litigation without any substantive rights. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002).

By serving as notice of litigation and binding subsequent purchasers, a lis pendens has both retroactive and prospective effect. As a result, the Court’s resolution of the validity of the lis pendens will have a practical legal effect on purchasers of the property subject to the lis pendens during the appeal and after the Court’s decision. If the Court reverses the circuit court’s cancellation of the lis pendens without lifting the stay, then those individuals who purchased property during the appeal and after the Court’s decision will take that property subject to the judgment awarded in the underlying litigation. If, however, the Court affirms the circuit court’s decision, then those purchasers will take the property free and clear of any judgment awarded in the litigation. Either way, the Court’s decision will have practical legal effect. Thus, lifting the automatic stay is not necessary to prevent the issue of the validity of the lis pendens from becoming moot.

Nevertheless, Pulte argues that maintaining the stay will moot the appeal because it will allow the lis pendens to remain in place during the appeal. This argument is based on a

fundamental misunderstanding of mootness. The maintenance of the stay will not moot the issue on appeal. Rather, it merely preserves the *status quo* until the Court can decide the appeal, which is precisely the purpose of the automatic stay. *See Melton*, 209 S.C. at 336, 40 S.E.2d 161 at 164 (explaining that the purpose of the automatic stay is to “preserve the *status quo* pending the determination of the appeal or proceeding in error”). Put simply, mootness simply does not mean what Pulte contends. As explained above, the issue on appeal will remain ripe and not become moot if the automatic stay remains in place. Therefore, Pulte cannot demonstrate that the stay should be lifted to prevent the issue on appeal from becoming moot.

II. Lifting the stay will likely moot the issue on appeal.

Although lifting the stay is not necessary to prevent the issue on appeal from becoming moot, lifting the stay could produce that effect. Again, a *lis pendens* “binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation.” *Pond Place Partners*, 351 S.C. at 16, 567 S.E.2d at 889. If the automatic stay is lifted and is effectively canceled during the appeal, the *lis pendens* would have no binding effect on the purchasers who buy the subject property during the appeal. And if the Court ultimately reverses the circuit court’s cancellation of the *lis pendens* and American Star prevails on the merits of underlying litigation, then those purchasers would be able to avoid the binding nature of the *lis pendens*, thereby defeating its underlying purpose.

In other words, the Court’s ultimate decision would have no practical legal effect on those purchasers. Because Pulte is actively engaged in building and selling homes to homebuyers, it is possible – if not likely – that all lots in the development could be sold prior to the appeal’s conclusion. If that occurs, then the issue on appeal will be entirely moot because the Court’s decision would not grant American Star any effectual relief.

The circuit court correctly recognized this possibility and denied Pulte's motion to lift stay to avoid this result. According to the circuit court, lifting the automatic stay "would moot issue of whether or not the lis pendens should have been filed." See Order, attached as Ex. 2 to Respondent's Petition. Thus, lifting the stay may actually create the exact situation that Rule 241(c)(2), SCACR, seeks to avoid, and the Court should deny Pulte's petition to lift the stay accordingly.

III. Pulte will not suffer irreparable harm if the stay remains in place.

Pulte also argues that the stay should be lifted because it will suffer "irreparable harm" if the stay is not lifted. Pulte's argument has no merit. Its alleged damages are relatively minor and quantifiable, and they may be recoverable against American Star through Pulte's existing counterclaim for abuse of process arising from the filing of the lis pendens. Thus, any harm arising from the automatic stay is not irreparable.

According to Pulte, the automatic stay has resulted in delays in scheduled home sales, which has produced "direct and tangible" harm. The alleged harm includes a delay in receiving revenue from the home sales and additional carrying costs of \$3,300 per month. This harm can hardly be considered irreparable as that term has been defined by courts. See *Smith & Nephew, Inc. v. Synthes*, 466 F. Supp. 2d 978, 983 (W.D. Tenn. 2006) (stating that "irreparable harm" has been defined to mean "harm which cannot be repaired"); *Flood v. Kuhn*, 309 F. Supp. 793, 799 (S.D.N.Y. 1970) (defining "irreparable harm" as an "irremediable injury that is certain and great"). While South Carolina courts have not precisely defined "irreparable harm," this Court has previously noted that a complete loss of a business can be considered irreparable harm. See *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005).

Under any reasonable measure, Pulte's business is not threatened by any delays associated with the development in question. In its most recent annual report filed with the United States Securities and Exchange Commission, Pulte's publicly-traded parent corporation reported nearly \$10 billion in home sales revenue in 2018 alone.² Delayed home sales and costs associated with this litigation were not disclosed to Pulte's investors as a material risk in its annual report. Assuming Pulte prevails on its appeal, then it can later seek to recover any damages in its counterclaim against American Star. Plainly, Pulte's business will survive if the Court maintains the automatic stay, and Pulte's claim of irreparable harm rings hollow.

CONCLUSION

For the foregoing reasons, American Star respectfully requests that the Court deny Pulte's Petition for an Order Lifting the Automatic Stay.

Respectfully submitted,



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² <http://d18rn0p25nwr6d.cloudfront.net/CIK-0000822416/6d1181eb-9f8f-4137-9a91-818471af7b93.pdf>

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Of whom American Star Development SC, LLC is the Appellant,

Of whom Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the .. Respondent.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **APPELLANT’S RETURN TO RESPONDENT’S VERIFIED PETITION FOR AN ORDER LIFING THE AUTOMATIC STAY** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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Re: American Star Development vs. PulteGroup, Inc.
Appellate Case No. 2018-002277
MVA File No. 042460.01

Dear Ms. Kitchings:

Enclosed Please find an original and seven copies of Appellant's Return to Respondent's Verified Petition for an Order Lifting the Automatic Stay in the above-referenced matter along with the original and one copy of the Proof of Service. Please file the originals and return a filed stamped copy of each document to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same.

Thank you for your assistance with this matter and please call me with any questions.

Sincerely,

Moore & Van Allen PLLC



E. Brandon Gaskins

EBG/ws

Enclosures as stated.

cc w/enc.: G. Trenholm Walker, Esquire
John P. Linton, Jr., Esquire
Susan M. Gaddy, Esquire

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