

THE STATE OF SOUTH CAROLINA
In the 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.

REPLY BRIEF OF APPELLANT

RECEIVED

JUN 20 2019

SC Court of Appeals

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ARGUMENT

I. The action for specific performance of the construction of the access road affects title to real property regardless of whether the complaint includes the term “easement.”

In defense of the cancellation of the lis pendens as to those lots which could serve as the location for the access road, Pulte relies on a heightened pleading standard that is not supported by South Carolina law. (Pulte Initial Br. pp. 12-17.) In the complaint, American Star seeks specific performance of the design and construction of an access road over Pulte’s property that will serve the adjacent property. (Am. Compl. ¶¶ 28-35.) Although it cannot be denied that such an access road would serve as an easement and limit Pulte’s use of the property, Pulte incredibly argues that the complaint fails to support a lis pendens because the word “easement” is omitted from the complaint. (Pulte Initial Br. pp. 13-14, 16-17.)

Pulte argues that the omission in the complaint of a specific request for the establishment of an “easement” is fatal to American Star’s arguments in support of the lis pendens. (*Id.*) In so doing, Pulte implies that “easement” is a magic word that must be pleaded to support the lis pendens as to the lots in question. However, South Carolina courts have never imposed such an exact pleading standard. Rather, the South Carolina Rules of Civil Procedure have consistently required the liberal construction of pleadings to ensure substantial justice to the parties. *See* Rule 8(f), SCRCF, (“All pleadings shall be so construed as to do substantial justice to all parties.”); *Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (“To ensure substantial justice to the parties, the pleadings must be liberally construed.”).¹

¹ In support of its strict construction of the complaint, Pulte argues that S.C. Code Ann. § 11-15-10 must be strictly construed. Although South Carolina courts have recognized that strict compliance with the procedural requirements of the lis pendens statute is required, *see S.C. Nat’l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 563 (1987) (stating that strict compliance with statutory provisions is required), South Carolina courts have not held that the allegations of the complaint should be construed strictly for the purposes of determining whether an action affects real title under S.C. Code Ann. § 15-11-10. In fact, there does not appear to be any decisions under

Under any common-sense interpretation of the complaint, the action for specific performance of the construction of the access road affects title to real property. The action seeks the right to use Pulte's lots for access to the adjacent property and to limit Pulte's ability to use those lots for purposes other than access. Because this action involves a determination of Pulte's rights and liabilities incident to ownership of the lots that could serve as the location for the access road, it necessarily affects title to real property. And the inclusion or omission of a specific request for an easement does not change that conclusion. Therefore, the lis pendens arising from the action for specific performance of the construction of the access road is proper under S.C. Code Ann. § 15-11-10.

II. The existence or satisfaction of a condition precedent is irrelevant to whether the action affects title to real property under S.C. Code Ann. § 15-11-10.

Pulte also incorrectly argues that the lis pendens relating to the lots where the access road could be located is improper because American Star has not alleged the prerequisites for use of the access road, which Pulte characterizes as a condition precedent. Notwithstanding the fact that the contractual obligation to design and construct the access road is not subject to a condition precedent, this argument lacks merit because the determination of whether the action for specific performance affects title to real property under S.C. Code Ann. § 15-11-10 is not dependent on

South Carolina law addressing whether the lis pendens statute requires a strict interpretation of "affecting title to real property" or imposes a heightened pleading standard as Pulte seems to apply. Other jurisdictions, however, have rejected a narrow interpretation of "affecting title to real property." For example, in *Hammersley v. District Court in and for County of Routt*, 610 P.2d 94, 96 (Colo. 1980), the Colorado Supreme Court held that to further the purpose of the lis pendens statute in favor of successful completion of litigation involving real property, "affecting title to real property" should be given an "expansive interpretation." To effectuate the policy of liberal construction of pleadings under the South Carolina Rules of Civil Procedure, the Court should not adopt Pulte's position that strict compliance with the procedural requirements of the lis pendens statute requires a strict construction of "affecting title to real property" or imposes a heightened pleading standard to support a lis pendens.

whether the purported condition precedent has been satisfied. Rather, even if American Star cannot use the road until certain events occur, Pulte has an unconditional obligation to design and build the access road under Section 31(b) of the Primus Property purchase agreement. Thus, if the specific performance action is successful, Pulte's use of the lots in question will be restricted, which demonstrates that the action seeks a determination of Pulte's rights and liabilities incident to ownership of those lots. Therefore, the existence or satisfaction of a condition precedent to American Star's use of the access road is irrelevant and should not affect the Court's consideration of this appeal.²

III. The lis pendens as to those lots involved in the declaratory judgment action relating to the sharing of condemnation proceeds has been cancelled, which renders moot the issue of whether that action affects title to real property.

“An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists.” *Skydive Myrtle Beach v. Horry County*, 424 S.C. 298, 303, 818 S.E.2d 224, 227 (Ct. App. 2018). “A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy.” *Id.* “Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief.” *Id.*

In this case, the issue of whether the action for declaratory judgment as to sharing condemnation proceeds affects title to real property is now moot because the lis pendens as to the lots involved in that action has been canceled. (Third Am. Lis Pendens.) Until recently, the Town of Mount Pleasant had identified portions of the Primus Property as within the Billy Swails

² In addition, this argument is not properly before the Court. Pulte did not make this argument to the circuit court, and the circuit court did not rule on this argument. To the extent Pulte argues that this argument is an additional sustaining ground under Rule 220(c), SCACR, the record is not sufficient to allow this argument to serve as an additional sustaining ground. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record . . .”).

Boulevard Phase 4B Project Area. (Pls.' Resp. Mot. Cancel Lis Pendens, p. 2 & Ex. 4.) However, after American Star filed the initial brief in this appeal, the Town released three options of the proposed route for the contemplated road expansion. Those options did not include in the potential project areas any of the homebuilding lots in the Primus development. As a result, Plaintiffs filed an amended lis pendens, which cancels the lis pendens on all lots except those which could serve as the location of the access road. (Third Am. Lis Pendens.) Because the lis pendens has been cancelled as to those lots involved in the declaratory judgment action, the issue is moot, and there is nothing for the Court to consider.

IV. Substitution of parties should be permitted to allow for resolution of the appeal on its merits.

Pulte asserts an additional sustaining ground that American Star cannot claim an interest in real property that would support the lis pendens because American Star previously assigned its rights under the Primus Property purchase agreement. This argument should be rejected because American Star will be moving for substitution of parties pursuant to Rule 265(c), SCACR, to allow the appeal to be pursued by American Star's affiliated entity, American Star SPE-2, LLC.³ American Star SPE-2, LLC has been assigned American Star's and its affiliated entities' rights and obligations under the Primus Property purchase agreement and their interest in this litigation and appeal. Thus, American Star SPE-2, LLC has standing to pursue the claims and appeal in this action, and the Court should not dismiss the appeal on any technical deficiencies arising from the mistaken identity of the party in interest. *See Patton v. Miller*, 420 S.C. 471, 488, 804 S.E.2d 252,

³ As previously indicated in American Star's initial brief, Plaintiffs have filed in the Court of Common Pleas of Charleston County a motion to substitute parties which would substitute American Star SPE-2, LLC as the only plaintiff in this action. The circuit court recently heard this motion and has indicated that it will be granted. Upon receipt of the written order granting the motion to substitute, American Star will similarly move for substitution of parties in this appeal pursuant to Rule 265(c), SCACR.

262 (2017) (providing that the courts should allow substitution of parties when there has been an honest mistake as to the proper party to avoid an unnecessary procedural dismissal of a lawsuit and to allow resolution on the merits). In the interest of fairness and resolution on the merits, the Court should reject this additional sustaining ground. *See I'On*, 338 S.C. at 420, 526 S.E.2d at 723 (stating that appellate court may rely on additional sustaining grounds if it is fair to do so).

VI. The incomplete record on appeal does not support its resolution on an additional sustaining ground relating to whether the Primus Property was conveyed free and clear of all liens and encumbrances.

Last, Pulte argues that American Star's actions do not affect title to real property under S.C. Code Ann. § 15-11-10 because the Primus Property purchase agreement required the Primus Property to be conveyed free and clear of all liens and encumbrances. According to this argument, American Star cannot now assert any interest in the real property because of this requirement. Even though this argument was not previously raised, Pulte advances it now as an additional sustaining ground.

Pulte's argument fails, however, because the issue of whether American Star complied with its purported contractual duty to convey title free and clear of any liens or encumbrances should not affect the Court's analysis of whether the action affects title to real property. To the extent that Pulte argues that American Star is estopped from asserting an interest in the Primus Property based on this contractual provision, this argument was not previously raised or ruled upon by the circuit court. As a result, the record on appeal lacks sufficient information for the Court to adopt Pulte's argument, and it should be rejected accordingly.

CONCLUSION

For the foregoing reasons, American Star respectfully requests that the Court reverse and vacate the circuit court's order to cancel the lis pendens involving the action for specific performance and reinstate such lis pendens during the pendency of the litigation.

Respectfully submitted,



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June 17, 2019
CHARLESTON, SC

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And 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 **REPLY BRIEF OF APPELLANT** and **AMENDED DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** 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 for filing, please find an original and one copy of **Appellant's Reply Brief, Amended Designation of Matter to be Included in the Record on Appeal, and Proof of Service** in the above-referenced matter.

Please file the originals and return a filed copy of each to this office in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in 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
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