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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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JUL 18 2019

SC Court of Appeals

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 theAppellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is theRespondent:

**RESPONDENT'S MOTION TO STRIKE PORTIONS OF APPELLANT'S INITIAL
BRIEF, DESIGNATION OF MATTER, INITIAL REPLY BRIEF, AND AMENDED
DESIGNATION OF MATTER**

G. Trenholm Walker (SC Bar #5777)
John P. Linton, Jr. (SC Bar #79130)
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P.O. Box 22167
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843 727-2200

ATTORNEYS FOR RESPONDENT
Pulte Home Corporation, n/k/a Pulte Home
Company, LLC

July 16, 2019

Respondent, Pulte Home Corporation, n/k/a Pulte Home Company, LLC, (“Respondent” or “Pulte”) hereby moves for an order striking portions of American Star Development SC, LLC’s (“American Star” or “Appellant”) Initial Brief, Designation of Matter to be Included in the Record on Appeal, Initial Reply Brief, and Amended Designation of Matter to be Included in the Record on Appeal and prohibiting Appellant from including those items in its final brief, final reply brief and the record on appeal. As explained below, Respondent bases this Motion on Appellant’s inclusion of matters that were not before the lower court that are forbidden from inclusion in the Record on Appeal by the Rules of Appellate Procedure.

Appellant filed its Notice of Appeal on December 20, 2018, appealing the Order of the Honorable R. Lawton McIntosh, Circuit Judge, dated November 14, 2018, and filed November 16, 2018, that granted Respondent’s Motion to Cancel the Lis Pendens filed by Appellant and the two other Plaintiffs. See Ex. A (**Notice of Appeal**).

In its two briefs and designations of matter, Appellant cites to two filings Appellant made in the lower court many months after the Order on appeal was issued and Appellant filed its Notice of Appeal: Appellant’s Motion to Substitute Parties that was filed March 5, 2019, and Appellant’s Third Amended Lis Pendens filed June 17, 2019.

Appellant’s inclusion of these matters in the record and reference to them in its briefs violate SCACR 210(c) and 208(b)(4). Therefore, Appellants references to the Motion to Substitute Parties and to the Third Amended Lis Pendens should be stricken from the briefs prior to Appellant filing its final briefs and excluded from the record on appeal. SCACR 210(c) (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”); SCACR 208(b)(4) (“The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support

the salient facts alleged.”)’ See also, SCACR 209 (b) (limiting the designation of matter to materials allowed under Rule 210 (c)).

For these reasons, Respondent requests that this Court issue an order striking the following:

From Appellant’s Designation of Matter to be Included in the Record on Appeal:

- Item 15 (Appellant’s Motion to Substitute Parties and Amend Amended Complaint filed March 5, 2019).

From Appellant’s Amended Designation of Matter to be Included in the Record on Appeal:

- Item 15 (Appellant’s Motion to Substitute Parties and Amend Amended Complaint filed March 5, 2019)
- Item 16 (Appellant’s Third Amended Lis Pendens filed June 17, 2019)

From Appellant’s Initial Brief:

- Footnote 1 on page 2:

As set forth in the amended complaint and motion to substitute parties, American Star’s affiliated entities were assigned interests and rights under the underlying purchase agreement. (Am. Compl. ¶¶ 16-17; Mot. Substitute Parties, Ex. 1.) In addition, American Star’s affiliated entity owns adjacent property. (Id.) Those affiliated entities have assigned their rights and interest in the litigation and underlying agreement to American Star SPE-2, LLC, and Plaintiffs have moved to substitute American Star SPE-2, LLC as the sole plaintiff in this case. (Id) For the sake of clarity, “American Star” is used to refer collectively to all entities and their assigns.

- Last 3 sentences of page 3:

While the appeal was pending, Plaintiffs assigned their interests and rights in the litigation and underlying contract to an affiliated entity, American Star SPE-2, LLC. (Mot. Substitute Parties, Ex. 2.) On March 5, 2019, Plaintiffs filed a motion to substitute parties and amend the amended complaint, whereby American Star SPE-2, LLC would become the sole plaintiff. (Mot. Substitute Parties.) That motion remains pending.

- Citation to “Mot. Substitute Parties, Ex. 1” on page 4

From Appellant's Reply Brief

- Section III, pages 3-4
- Section IV, pages 4-5

The issues before this Court on this appeal are whether the lower court correctly decided the legal issues before it in granting Respondent's Motion to Cancel the Lis Pendens based on the record before it. The above filings three months or more after Judge McIntosh rendered his ruling are irrelevant to the issues before this Court, are improper under the rules governing this Court, and should be stricken. Respondent further requests that this Court's order prohibit Appellant from referring to its later filings in its final briefs as well.

Respectfully submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: 

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ATTORNEYS FOR RESPONDENT,
PULTE HOME CORPORATION, n/k/a
PULTE HOME COMPANY, LLC

July 16, 2019
Charleston, South Carolina

Ex. A

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

Case No. 2018-CP-10-2175

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 whom American Star Development SC, LLC is the Appellant,

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

NOTICE OF APPEAL

American Star Development SC, LLC ("Appellant") appeals the Order of the
Honorable R. Lawton McIntosh, dated November 14, 2018, and filed November 16,
2018, which granted the Motion to Cancel Lis Pendens filed by Defendants PulteGroup,
Inc. and Pulte Home Corporation, n/k/a Pulte Home Company, LLC. Appellant received
written notice of the entry of the Order on November 20, 2018.



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SC Court of Appeals

Ex. A

December 20, 2018

Charleston, SC

charlesscarminach@mvalaw.com

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Attorneys for Defendant JW Homes, LLC

Ex. A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) Civil Action No.: 2018-CP-10-2175

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,)

ORDER CANCELLING
LIS PENDENS

FILED
2018 NOV 19 AM 11:40
CLERK OF COURT

This matter came before the Court for hearing on September 21, 2018, on the Amended Motion to Cancel *Lis Pendens* of Defendant Pulte Home Corporation, n/k/a Pulte Home Company, ("Pulte") seeking to cancel the three *lis pendens* filed by Plaintiffs on real property owned by Pulte. G. Trenholm Walker, Esq. and John P. Linton, Jr., Esq., appeared on behalf of Pulte, and E. Brandon Gaskins, Esq. appeared on behalf of Plaintiffs. Defendant J. W. Homes, LLC, ("JWH") was represented at the hearing by Susan M. Gaddy, Esq. For the reasons explained herein, the Court GRANTS the motion and cancels the three *Lis Pendens* filed by Plaintiffs.

BACKGROUND

Plaintiff American Star Development SC, LLC, filed a Summons and Complaint against the above captioned defendants on April 26, 2018, and an Amended Complaint (adding the other two Plaintiffs) on May 1, 2018. Plaintiffs filed a *Lis Pendens* on April 26, 2018, an Amended *Lis Pendens* on June 13, 2018, and a Second Amended *Lis Pendens* on August 28, 2018 (collectively referenced as "the *Lis Pendens*").

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Ex. A

According to the allegations of the Amended Complaint, Plaintiff American Star Development SC, LLC, ("American Star") is the former owner of 24.81 acres in Mount Pleasant (the "Property"). Plaintiff American Star sold the Property to Defendant JWH, now known as Falcon Properties, LLC. Defendant JWH later sold the Property to Defendant Pulte pursuant to a written Asset Purchase Agreement between Pulte and JWH.¹ According to the Agreement for Purchase and Sale between American Star Development SC, LLC ("Seller") and JWH Acquisitions, LLC or its assigns dated February 25, 2015, copy attached as Exhibit A to the Amended Complaint (the "Agreement"), the Property was intended to be developed into at least 73 single family residential lots. Exhibit A at ¶ 11(b).

The Second Amended *Lis Pendens* asserts that the Amended Complaint affects 46 separate lots that are part of the final plat of a subdivision of the Property now owned by Pulte that was recorded June 21, 2018, in Plat Book L18 at Pages 0336-0339 in the ROD Office for Charleston County, according to the property description attached to the Second Amended *Lis Pendens*.

The Amended Complaint alleges, among other things, that Pulte assumed the terms of the Agreement and is liable thereunder "to design, seek approval for, and construct" a road that connects the Property to adjoining land owned by American Star. Plaintiffs allege that Pulte has breached the Agreement by failing to design, seek approval for, and construct the connecting road. Plaintiff American Star also alleges it "has been damaged by the diminution in value" of its adjacent property "resulting from lack of access" to it from the Property.

Plaintiff's first cause of action is for breach of contract against Pulte, seeking the relief of specific performance requiring Pulte to design and construct the connection road on Pulte's own

¹ Terms of the JWH-Pulte Asset Purchase Agreement are not before the court.

Ex. A

property or, in the alternative, for an award of money damages for the alleged loss in value of its adjoining land due to the lack of the connection road.

The second cause of action in the Amended Complaint asserts that Pulte is equitably estopped from denying “obligation to design, seek approval for, and construct the Connection, and it should be ordered to fulfil such obligation.”

Plaintiffs’ third cause of action for declaratory judgment is premised on another provision of the Agreement dealing with the possible condemnation of a portion of the Property for a public road right of way. Plaintiffs allege the Agreement obligates Pulte to split the net proceeds from any such condemnation with Plaintiffs. Plaintiffs therefore seek a declaratory judgment that Pulte has the “obligation to share the proceeds from any subsequent condemnation” with Plaintiffs.

The Amended Complaint does not contain any allegations asserting a claim to establish an easement nor does the Agreement attached as Exhibit A that is the basis for Plaintiffs’ claims refer to the grant of an easement or even use the word “easement” concerning the alleged connection road.

DISCUSSION

The Second Amended *Lis Pendens* purports to provide notice that 46 separate parcels owned by Pulte are “real estate [is] affected by” the action. However, there are no allegations in the Amended Complaint asserting any right to, interest in, or encumbrance on, the *title* to any of these parcels or any of the Property.

South Carolina Code 15-11-10, allows the filing of *lis pendens* only in “an action *affecting the title* to real property.” (double emphasis added). A circuit court properly cancels a *lis pendens* when the action does not affect the title to real property. See Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012) (“if the court finds that the *lis pendens* does not

Ex. A

'affect [] the title to real property' as required under § 15-11-10, the *lis pendens* is not authorized by the statute and the statute does not limit the court's power to cancel it."). The filing of a *lis pendens* is an extraordinary privilege granted by statute and strict compliance with the statutory provisions is required. See South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 532, 354 S.E.2d 562, 563 (1987) (finding a complaint filed more than twenty days after the filing of the *lis pendens* renders the *lis pendens* invalid).

In this case, the threshold statutory requirement is not met. The allegations of the Amended Complaint do not assert that this action affects title to Pulte's real property.

Plaintiffs correctly note the extraordinary statutory privilege to file a *lis pendens* applies not only to those cases that involve the question of title, but also those cases that are brought to establish an equitable estate, interest, or right in specific real property or to enforce an encumbrance. See Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) (listing types of actions that may sufficiently allege title to real property is affected such that a *lis pendens* is proper). Plaintiffs argue that the *lis pendens* is proper because their claims are "essentially" claims to establish the existence of an easement, enforce an encumbrance, and/or establish an equitable interest in real property.

However, as discussed above, the allegations of the Amended Complaint do not assert any such claims, even when considering all the relevant terms of the Agreement attached to the Amended Complaint as Exhibit A. Additionally, the prayer seeks the following relief, making no mention of enforcing an easement or encumbrance or establishing an equitable interest in the Property or the lots subjected to the Second Amended *Lis Pendens*:

- a. That this Court enter judgment (i) against PulteGroup and/or PHC and grant specific performance requiring PulteGroup and/or PHC to design, seek approval for, and construct the Connection; (ii) or, alternatively, award damages to

Ex. A

American Star for the loss in value of the Adjacent Property either against PulteGroup, PHC, and/or JWH;

b. That this Court enter a declaratory judgment that PulteGroup and PHC are successors to JWH with respect to JWH's obligations under the Agreement and, therefore, have an obligation to share with Plaintiffs the proceeds from any subsequent condemnation of the Primus Property or any portion thereof;...

The prayer does not seek relief that affects *title* to Pulte's real property. Plaintiffs do not seek to establish an easement, equitable estate, or right in real property or enforce any encumbrance on real property.

Likewise, the alleged obligation to share proceeds from a future condemnation of a part of the Property for a road right of way—the subject of the third cause of action and subparagraph (b) of the prayer for relief—does not affect the title to the lots or the Property. Plaintiffs instead assert an alleged contractual right to money (i.e., condemnation *proceeds*). Plaintiffs' right or interest, if any, concerns personal property, not real property. See, e.g., Martin & Earle v. Maxwell et al., 86 S.C. 1, 67 S.E.2d 962, 964 (1910) (“Since under the will the trustee therein named was to sell the land and divide the proceeds of the sale after the death of the life beneficiary, the interest of F. B. Maxwell and the other children of Mrs. Maxwell is a contingent interest, not in the land, but in the proceeds of the land, which is personalty.”); see also, Caulk v. Orange County, 661 So. 2d 932, 934 (Fla. 5th Dist. App. 1995) (holding a covenant purporting to reserve to a grantor a right to condemnation proceeds could not run with the land because “[t]he only thing the covenant in the instant case really ‘touches’ and ‘concerns’ is the intangible personal property, namely cash, that may be paid by a condemnor.”)

Therefore, the Court finds the *Lis Pendens* is improper and grants Pulte's motion.

Ex. A

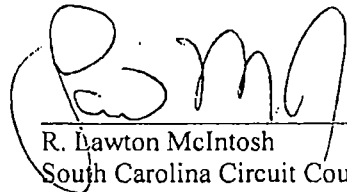
CONCLUSION

IT IS THEREFORE ORDERED, for the foregoing reasons, that Pulte's Amended Motion to Cancel Lis Pendens be, and the same is hereby, **GRANTED** and the Second Amended *Lis Pendens*, Amended *Lis Pendens*, and *Lis Pendens* filed herein are hereby **CANCELLED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court is hereby directed to mark the Second Amended *Lis Pendens* filed August 28, 2018, the Amended *Lis Pendens* filed June 13, 2018, and the *Lis Pendens* filed April 6, 2018 (Court File No. 2018-LP-10-336), as cancelled and dissolved ten (10) days from the date of entry of this Order.

AND IT IS SO ORDERED!

November 14, 2018
Anderson, South Carolina



R. Lawton McIntosh
South Carolina Circuit Court Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Of which American Star Development SC, LLC is theAppellant,

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

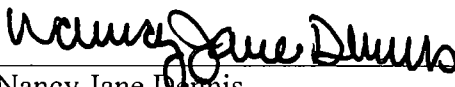
PROOF OF SERVICE

I certify that I have served the **Respondent's Motion to Strike Portion of Appellant's Initial Brief, Designation of Matter, Initial Reply Brief and Amended Designation of Matter** by depositing a copy in the United States Mail, postage prepaid, on July 16, 2019, addressed to the attorneys of record:

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Nancy Jane Dennis
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July 16, 2019

US MAIL [X] FEDERAL EXPRESS[]

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

Re: American Star Development, etc., et al., v. PulteGroup, Inc., et al.
Appellate Case No. 2018-002277
WGFL File No.: 7887.002

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Motion to Strike Portion of Appellant's Initial Brief, Designation of Matter, Initial Reply Brief and Amended Designation of Matter with Proof of Service and \$50 filing fee.

Your courtesies and consideration of this matter are greatly appreciated.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC



John P. Linton, Jr.

Enclosures (Motion, Proof and Check)

c: E. Brandon Gaskins, Esq.
John A. Massalon, Esq.
Mark V. Hanrahan, Esq.
Michele Lee Stumpe, Esq.

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SC Court of Appeals

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SC Court of Appeals

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