

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

AUG 06 2019

SC Court of Appeals

Appellate 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.

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**RESPONDENT'S RETURN TO APPELLANT'S  
MOTION TO SUBSTITUTE PARTY**

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August 5, 2019  
Charleston, South Carolina

Respondent, Pulte Home Corporation, n/k/a Pulte Home Company, LLC (“Pulte” or “Respondent”), respectfully submits this Return to Appellant’s Motion to Substitute Party (the “Motion”). As explained herein, the Court should deny the request to substitute American Star SPE-2, LLC (“SPE-2”) for the Appellant.

### **BACKGROUND**

American Star appeals an order of the lower court cancelling the Lis Pendens<sup>1</sup> that it and the other two Plaintiffs, KKMC Investments, LLC and 211, LLC (“the LLCs”), filed with their Amended Complaint. See (Notice of Appeal). American Star is the only appellant.

The Amended Complaint asserted claims supposedly arising under a contract entered in February 2015 in which American Star agreed to sell to JWH Acquisitions, LLC (the “2015 Agreement”) several assembled parcels in Mount Pleasant (the “Primus Property”). See (Am. Compl., ¶ 11 and Ex. A); (R. pp. 054, 063-084). As alleged in the Amended Complaint, Defendant J.W. Homes, LLC, purchased the Primus Property on July 31, 2015, and later sold it to Pulte in January 2016. See (Am. Compl., ¶¶ 17 & 20); (R. p. 055).

The Circuit Court premised its order cancelling the Plaintiffs’ Lis Pendens on its determination that none of the three Plaintiffs alleged claims in the Amended Complaint that affected an interest in title to Pulte’s real property (the “Primus Property”). See (Order filed November 16, 2018, p. 3); (R. pp. 003-008) (“ . . . 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”)(emphasis supplied by lower court)). On December 19, 2018, American Star was the only one of the three Plaintiffs that appealed. See (Notice of Appeal).

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<sup>1</sup> As used herein, the term “Lis Pendens” refers to the Lis Pendens, Am. Lis Pendens and Second Am. Lis Pendens. **(R. pp. 009-013, 101-105, 120-122)**.

The parties to this appeal have filed their initial briefs, and American Star recently filed the Record on Appeal. In its initial brief, Pulte asserts as an additional sustaining ground that American Star assigned all its interests and rights in and to the 2015 Agreement to the other two Plaintiffs, the LLCs.

American Star does not dispute that it assigned away all of its rights almost three years before bringing this lawsuit. See (Am. Compl., ¶ 16.<sup>2</sup>) (R. p. 055); (Ex. 1, Aff. of Brian Harvin, ¶¶ 2, 8, 10). Now, through the instant Motion to Substitute, American Star is attempting to assert the rights of the LLCs that did not appeal through a new, fourth entity, SPE-2. For the reasons explained herein, the Motion should be denied.

### **DISCUSSION**

The time for filing an appeal is jurisdictional and cannot be extended by any mechanism. See generally, USAA Prop. and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.”).

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<sup>2</sup> According to the Amended Complaint, “[s]ubsequent to entering into the [2015] Agreement but before the closing on the purchase of the Primus Property, ... American Star assigned its rights, obligations, and interest under the [2015] Agreement to 211, LLC and KKMC Investments, LLC.” **(Am. Compl., ¶ 16.) (R. p. 055).** American Star has conclusively admitted it assigned all of its rights under the 2015 Agreement that is the basis for its claims to the other two Plaintiffs that have not appealed. See Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (“The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.”).

Here, Appellant has orchestrated an assignment of the alleged rights of the two LLCs that did not appeal and seeks to have this Court effectively make those entities appellants, well after the deadline for filing an appeal. Because the appeal deadline is jurisdictional, the Court should deny the Motion.

Only the rights of American Star are involved in this appeal because American Star is the only party that appealed. As explained above, American Star had no rights under the 2015 Agreement to assign to SPE-2. Therefore, SPE-2 gained no rights of American Star by virtue of the assignment. There is simply no reason to allow the substitution because the only appellant did not assign anything to SPE-2.

It is worth noting that Rule 265(c), SCACR(c) requires the party seeking substitution, other than for death or incompetence, to do so by motion. See SCACR(c) (“If substitution of a party is desired for any reason other than death or incompetency, substitution shall be by motion to the appellate court.”). Substitution is not permitted as right. Pulte is not required to show prejudice for the Court to deny the Motion. However, it is worth noting that Pulte will be prejudiced if the substitution is allowed. As explained above, the LLCs did not appeal the Circuit Court’s order cancelling the Lis Pendens. As such, the cancellation of the Lis Pendens with respect to the two non-appealing Plaintiffs is the law of the case. See generally, Contin’l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App.1997) (“The trial court’s unappealed ruling becomes the law of the case, and we must assume the trial court was correct....”); Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993); Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.”). If SPE-2 is substituted and allowed to assert

rights purportedly assigned it by the LLC, both the jurisdictional appeal deadline and law of the case doctrine will be thwarted.

Further demonstrating prejudice is that Pulte has already filed its initial brief asserting as an additional sustaining ground the absence of any right held by American Star. Pulte will be prejudiced if American Star is able to defend against arguments made on appeal by substituting parties after Pulte has filed its initial brief.

For all the reasons discussed above, substitution would also be futile. American Star's purported assignment does not cure American Star's lack of standing to have filed the Lis Pendens. The Circuit Court has granted Pulte's Motion for Summary Judgment as to all claims asserted by American Star because it had no standing to bring claims under the 2015 Agreement when it had assigned away its interest in that agreement. See (Ex. 2, Order filed June 14, 2019, pp. 3-6); (Ex. 3, Order filed July 8, 2019) (granting Plaintiffs' Motion to Reconsider on an unrelated issue); see also, (Ex. 2, Order filed June 14, 2019, p. 5) ("The 2019 Assignment does not change the standing of Plaintiff American Star nor somehow provide standing to American Star SPE-2, LLC in place of American Star"). As explained by the lower court:

Because American Star admits it assigned away all its rights and interests in and under the 2015 Agreement in July 2015, and because the 2019 Assignment does not confer any rights on American Star or American Star SPE-2, LLC, there is no genuine issue of material fact, and Pulte is entitled to judgment as a matter of law as to the claims of American Star. American Star had no standing and was not the real party in interest for the claims asserted at the time suit was filed and did not establish an issue of fact that it acquired an interest or right under the 2015 Agreement during the pendency of the proceeding by virtue of the 2019 Assignment.

**(Ex. 2, Order filed June 14, 2019, p. 7).**

Further in an order allowing the substitution of parties and the filing of a second amended complaint, the Circuit Court denied the motion to substitute as to American Star because it was no

longer a plaintiff. See (Ex. 4, Order filed July 8, 2019, p. 5) (allowing SPE2 to be substituted for the KKMC Investments, LLC and 211, LLC but denying the request to substitute SPE-2 for American Star because “[b]y separate order, the Court has granted Pulte’s Motion for Summary Judgment on the claims for American Star for lack of standing; therefore, American Star is no longer a Plaintiff.”).<sup>3</sup>

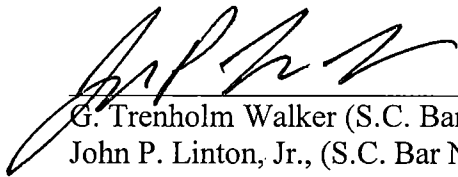
Consistent with the analysis by the Circuit Court, the assignment does not give the appellant rights not held by the Appellant when the appeal was initiated. For that additional reason, the Motion should be denied.

**CONCLUSION**

Therefore, for the reasons described herein, the Motion to Substitute should be denied.

Respectfully submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC



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August 5, 2019  
Charleston, South Carolina

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<sup>3</sup> While no longer a plaintiff, American Star is still a Counter-Claim Defendant. See (Ex. 4, Order filed July 8, 2019, p. 5) (“ . . . all three current Plaintiffs shall remain parties to the case as Counterclaim Defendants in the event that Pulte reasserts its counterclaim against them in its answer to the Second Amended Complaint.”).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO. 2018-CP-10-2175
	)	
AMERICAN STAR DEVELOPMENT SC, LLC; KKMC INVESTMENTS, LLC; AND 211, LLC;	)	
	)	
Plaintiffs,	)	
	)	<b>AFFIDAVIT OF BRIAN HARVIN</b>
vs.	)	
	)	
PULTEGROUP, INC.; PULTE HOME CORPORATION, N/K/A PULTE HOME COMPANY, LLC; AND JW HOMES, LLC,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

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Personally appeared before the undersigned officer duly authorized to administer oaths,  
 Brian Harvin, who, under oath, states as follows:

1. I, Brian Harvin, am over eighteen (18) years of age, and of sound mind and body.  
 I am competent to give this affidavit, and it is based upon my own personal knowledge.  
 I understand that this affidavit will also be presented to the Court in the above-captioned  
 civil action.
2. I am a member of American Star Development SC, LLC and the sole member of  
 KKMC Investments, LLC.
3. Pierce Cauthen is the other member of American Star Development SC, LLC,  
 and he is the sole member of 211, LLC.

4. 211, LLC and KKMC Investments, LLC are the two members of American Star SPE-2, LLC, which is a special purpose entity established to hold the Adjacent Property (as defined below) and provide the members and their constituent members legal protection and tax benefits.

5. American Star Development SC, LLC and JWH Acquisitions entered into an Agreement for Purchase and Sale (the "Agreement"), wherein American Star agreed to sell to JWH Acquisitions certain property located in the Town of Mount Pleasant, Charleston County, South Carolina, (the "Primus Property").

6. Section 31(a) of the Agreement set forth American Star Development SC, LLC's intent to purchase property adjacent to the Primus Property (the "ROFO Parcels"), including two parcels bearing TMS # 578-00-00-005 and # 578-00-00-006 (the "Adjacent Property").

7. Pursuant to Section 31(b) of the Agreement and in consideration for American Star Development SC, LLC granting JWH Acquisitions the right of first offer on the ROFO Parcels, JWH Acquisitions agreed that an access road through the Primus Property would be designed and constructed under standards applicable to public roads to provide vehicular and pedestrian access to connect the Primus Property to the Adjacent Property (the "Connection"). The parties intended for the Connection to be dedicated to the Town of Mount Pleasant and serve as a public easement for ingress/egress into the Adjacent Property.

8. As contemplated by the Agreement, American Star Development SC, LLC contracted to purchase the ROFO Parcels, including the Adjacent Property. Prior to

purchasing the ROFO Parcels, American Star Development SC, LLC assigned its contractual right to purchase the Adjacent Property to its affiliated companies, KKMC Investments, LLC and 211, LLC, which purchased the Adjacent Property. KKMC Investments, LLC and 211, LLC later transferred the Adjacent Property to their affiliated company, American Star SPE-2, LLC. American Star SPE-2, LLC is the current owner of the Adjacent Property.

9. Section 13(a) of the Agreement acknowledged that a portion of the Primus Property may be taken by eminent domain for the extension of Hungryneck Boulevard. That section provided that if a portion of the Primus Property is condemned to complete the Hungryneck Boulevard extension, the condemnation proceeds will be shared equally between JWH Acquisitions, or its successors, and American Star Development SC, LLC. Section 13(a) further provides that American Star Development SC, LLC's interest in the condemnation proceeds is to be memorialized in a recorded instrument.

10. Subsequent to entering into the Agreement but before the closing on the purchase of the Primus Property, JWH Acquisitions assigned its rights, obligations, and interest under the Agreement to JW Homes, LLC ("JWH"), and American Star Development SC, LLC assigned its rights, obligations, and interest under the Agreement to its affiliated entities, 211, LLC and KKMC Investments, LLC.

11. On or about July 31, 2015, 211, LLC and KKMC Investments, LLC, as assignees of American Star Development SC, LLC under the Agreement, conveyed the Primus Property to JWH, as assignee of JWH Acquisitions under the Agreement.

12. American Star Development SC, LLC; KKMC Investments, LLC; and 211, LLC have assigned their rights, obligations, and interest under the Agreement to American Star SPE-2, LLC pursuant to an assignment of claims and contract, which is attached as Att. A.

13. JWH later conveyed the Primus Property to Pulte Home Company (“PHC”) pursuant to PulteGroup’s purchase of substantially all of JWH’s assets.

14. Upon information and belief, PulteGroup and/or PHC (collectively “Pulte”) assumed JWH’s obligations under the Agreement, including the obligation to design and construct the Connection and to share condemnation proceeds.

15. Prior to the sale of the Primus Property to JWH, American Star Development SC, LLC engaged design professionals to prepare a conceptual plan as part of the planning process to obtain the necessary preliminary approvals from the Town of Mount Pleasant to annex into the Town and develop the Primus Property as a single-family residential development.

16. The conceptual plan did not depict the Connection for two primary reasons. First, neither American Star Development SC, LLC nor its affiliated entities had closed on the purchase of the Adjacent Property and the prospective purchase of that property was too speculative to justify including the Connection when it would result in a loss of a developable lot. Second, American Star Development SC, LLC was concerned about depicting possible future development of the Adjacent Property, on which a large pond is located. Staff of the Town’s planning department had expressed interest in preserving the pond or obtaining for the Town a right to use the pond in the future, which would

devalue the Adjacent Property. American Star Development SC, LLC was worried that the Town would condition approval of the requested annexation and conceptual plan for the Primus Property on securing the right to use the pond or its conservation. Therefore, American Star Development SC, LLC made the strategic decision to omit the Connection from its conceptual plan.

17. Although American Star Development SC, LLC omitted the Connection from its conceptual plan, American Star Development SC, LLC always intended for the Connection to be built in the event it purchased the Adjacent Property. American Star Development SC, LLC expressed this intention to JWH, and JWH has acknowledged its continuing obligation to construct the Connection after the closing of the sale of the Primus Property.

18. Upon information and belief, JWH disclosed the obligation to construct the Connection to Pulte during due diligence of the sale of its assets to Pulte.

19. Following Pulte's acquisition of the Primus Property, I, on behalf of American Star Development SC, LLC and its affiliated entities, have had multiple communications with Matt Raines of Pulte regarding American Star Development SC, LLC's and its affiliates' desire to have the Connection built and Pulte's obligation to construct the Connection. For example, in March 2017, I had a meeting with Mr. Raines in which Pierce Cauthen and I expressed our desire for the construction of the Connection. Later, I emailed Mr. Raines about the desired location of the Connection. Mr. Raines has never denied Pulte's obligation to build the Connection. It was only after American Star Development SC, LLC's attorney was informed by Pulte's attorney that Pulte denied its

obligation to build the Connection in 2018, just prior to the filing of this action, that anyone on behalf of Pulte had definitively denied an obligation to build the Connection.

20. On behalf of American Star Development SC, LLC and its affiliated entities, I have kept apprised of developments regarding the Town of Mount Pleasant's plans to complete the Hungryneck/Billy Swails Boulevard extension. Just a few weeks ago, I attended a meeting in which the Town provided information relating to its plans. Based on the information provided, the Town is actively engaged in the process of planning the extension and beginning land acquisition and construction activities to complete the extension.

21. I declare that I have read this affidavit and the statements contained herein are true and correct.



\_\_\_\_\_  
BRIAN HARVIN

Sworn to before me this

24<sup>th</sup> day of May, 2019

Allen C. Perry

Notary for the State of South Carolina

My Commission Expires: 1/13/2025

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 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. )  
 )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT  
 Civil Action No.: 2018-CP-10-2175

**ORDER**  
**ON PULTE'S MOTION FOR**  
**SUMMARY JUDGMENT**

FILED  
 2019 JUN 14 PM 3:01  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY

This matter came before the Court on May 28, 2019, on Defendants Pulte Home Corporation, n/k/a Pulte Home Company's ("Pulte Homes") and PulteGroup, Inc.'s (jointly, "Pulte") Motion for Summary Judgment.<sup>1</sup> G. Trenholm Walker and John P. Linton, Jr. appeared on behalf of Pulte, John A. Massalon appeared on behalf of JW Homes, LLC , and E. Brandon Gaskins appeared on behalf of Plaintiffs American Star Development SC, LLC ("American Star"), KKMC Investments, LLC and 211, LLC (collectively, "Plaintiffs"). Pulte filed the Motion for Summary Judgment on five separate grounds on January 31, 2019, more than a month before Plaintiffs filed their Motion to Substitute Parties and Amend Amended Complaint, addressed in a separate Order. In support of its Motion, Pulte submitted the Affidavit of Matthew Raines filed with the Motion.

<sup>1</sup> By letter dated May 24, 2019, JW Homes, LLC joined in Pulte's arguments in support of the Motion for Summary Judgment.

For the reasons explained herein, the Court GRANTS in part and DENIES in part Pulte's Motion for Summary Judgment.

**BACKGROUND**

American Star filed a Summons and Complaint against the Defendants on April 26, 2018, and an Amended Complaint (adding two additional Plaintiffs) on May 1, 2018.

Plaintiffs allege that “[o]n February 25, 2015, American Star and JWH Acquisitions entered into an Agreement for Purchase and Sale . . . wherein American Star agreed to sell to JWH Acquisitions” the “Primus Property” located in Mt. Pleasant South Carolina, for \$8,332,000. The Plaintiffs base their entire lawsuit on the provisions in this contract (the “2015 Agreement”) that is attached as an exhibit to the Amended Complaint.

According to the allegations of Paragraph 16 of the Amended Complaint, “[s]ubsequent to entering into the Agreement but before the closing on the purchase of the Primus Property, JWH Acquisitions assigned its rights, obligations, and interest under the Agreement to JWH, and American Star [Appellant herein] assigned its rights, obligations, and interest under the Agreement to 211, LLC and KKMC Investments, LLC.”

According to the allegations of Paragraph 17 of the Amended Complaint, JW Homes, LLC, as assignee of JWH Acquisitions, LLC, then closed on the purchase of the Primus Property on July 31, 2015. Six months later, JW Homes, LLC, sold the Primus Property to Pulte Home on January 14, 2016, as part of a larger asset sale, according to the allegations of Paragraph 18 of the Amended Complaint. The Amended Complaint asserts that Pulte assumed the obligations of the JWH Acquisitions, LLC, and JW Homes, LLC, under the 2015 Agreement.

The Amended Complaint complains of two things, both based on the 2015 Agreement. Plaintiffs (i) allege Defendants breached a provision requiring the “buyer” to design and construct

a short street on the Primus Property that would lead to the property line of the adjoining property, and (ii) seek a declaration that Pulte is bound by a provision obligating the “buyer” to split net proceeds with Plaintiffs from a possible future condemnation of any part of the Primus Property for a road right-of-way.

### APPLICABLE LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. See Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Lord v. D & J Enterprises, Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (quoting Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

### DISCUSSION

1. The Court grants Pulte’s Motion for Summary Judgment on the ground that Plaintiff American Star lacks standing.

By its own pleading, in Paragraph 16 of the Amended Complaint, American Star admits that at the time it brought this action it held no rights or interests under the 2015 Agreement. It assigned all its rights under the 2015 Agreement to the other two Plaintiffs in July 2015 before the closing of the sale to Defendant JW Homes, LLC. Upon the assignment, American Star no longer had any rights to assert related to the 2015 Agreement. See 6 Am Jur 2d Assignments § 122 (“The purpose of an assignment is to divest the assignor of a right. Thus, once a valid and unqualified

assignment is made, all interests and rights of the assignor are transferred to the assignee...”). Because it had no rights under the 2015 Agreement, American Star has no standing to bring the claims it is asserting under the 2015 Agreement as a matter of law.

“Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (alteration and internal quotation marks omitted). Standing concerns a party’s sufficient interest in the outcome of the litigation to warrant consideration of the party’s position by a court. Id. Standing is a fundamental requirement for instituting an action and is comprised of three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Smiley v. South Carolina Dep’t of Health & Env’tl Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32–33 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992) (alteration in original)). “The party seeking to establish standing carries the burden of demonstrating each of the three elements.” Sea Pines Ass’n for the Protection of Wildlife, Inc. v. South Carolina Dep’t of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citation omitted).

“Generally, a party must be a real party in interest to the litigation to have standing.” Hill v. S.C. Dep’t of Health & Env’tl. Control, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted). “A real party in interest for purposes of standing is a party with a real,

material, or substantial interest in the outcome of the litigation.” *Id.* (internal quotation marks omitted).

Here, the claims alleged by Plaintiff American Star all stem from the 2015 Agreement. American Star does not dispute, and in fact pleaded, that it assigned any rights it had under that agreement to other entities prior to the closing of the sale contemplated in the 2015 Agreement. Therefore, American Star did not have standing and was not a real party in interest at the time of filing of the Complaint or now.

Plaintiffs have moved to substitute a new party plaintiff, American Star SPE-2 LLC, based on an alleged assignment dated February 27, 2019, (the “2019 Assignment”) more than nine months after this suit was filed, arguing the 2019 Assignment somehow provides American Star standing. The 2019 Assignment is attached to Plaintiffs’ Motion to Substitute Parties and Amend Amended Complaint.

The 2019 Assignment does not change the standing of Plaintiff American Star nor somehow provide standing to American Star SPE-2, LLC in place of American Star. American Star had no rights under the 2015 Agreement to assign at the time of the 2019 assignment. An “assignee has no greater rights than the assignor.” 6 Am. Jur. 2d Assignments § 108; W. M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 579-580, 216 S.E.2d 518, 521 (1975) (“The fact that Kirkland happened to have liability insurance with Hartford produced no greater legal right in Hamlet than Hamlet had against Kirkland uninsured and, of course, unless Hamlet had an enforceable claim against Kirkland, Washington took nothing as either assignee or subrogee insofar as Kirkland is concerned.”).

In opposition to Pulte’s Motion, Plaintiffs submitted the affidavit of Brian Harvin, one of the members of American Star and the sole member of KKMC Investments, LLC. Harvin’s

affidavit confirms that summary judgment is appropriate as to American Star and does not create any genuine issue of material fact precluding summary judgment. Specifically, in paragraph 10, Harvin's affidavit confirms that prior to closing, American Star assigned all its right under the 2015 Agreement to 211, LLC and KKMC Investments, LLC. Therefore, it is undisputed that American did not have any rights under the 2015 Agreement at the time it filed suit, or now.

Plaintiffs assert that summary judgment should be denied because Plaintiffs have moved to substitute American Star SPE 2, LLC as the sole plaintiff in the case. As mentioned above, Plaintiffs assert that American Star, 211, LLC and KKMC Investments, LLC have all assigned their rights and interest under the 2015 Agreement to this new entity; and therefore, according to Plaintiffs, the substitution is proper and defeats summary judgment.

As indicated above, the Court disagrees that the 2019 Assignment and request for substitution defeats summary judgment as to American Star. As noted, the purported assignment by American Star of its interest under the 2015 Agreement to American Star SPE 2, LLC, is ineffective because American Star previously assigned any interest it had in the 2015 Agreement to 211, LLC and KKMC Investments, LLC four years ago. See generally, Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 202, 447 S.E.2d 869, 870–71 (Ct. App. 1994) (holding that assignment by bank after full indebtedness was paid through foreclosure sale of claim under fire policy did not convey any interest because the bank had no further interest in the property and, therefore, the assignment transferred no interest to the assignee.).

Rule 17(a), SCRCF provides that “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if

the action had been commenced in the name of the real party in interest.” Granting summary judgment as to American Star is not a dismissal of the action for failure to prosecute the action in the name of the real party in interest prohibited by Rule 17(a), SCRPC. In fact, by separate order, the Court is allowing American Star SPE 2, LLC, to be substituted as a plaintiff for KKMC Investments, LLC and 211, LLC, thereby allowing the case to be adjudicated on the merits between the real parties in interest. See Patton v. Miller, 420 S.C. 471, 488, 804 S.E.2d 252, 261 (2017), reh’g denied (Sept. 27, 2017) (“The purpose of this provision is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits.”).

Whether American Star ever had standing to bring this lawsuit is not a procedural question, it is substantive, and there is no genuine issue of material fact that it did not. Because American Star admits it assigned away all its rights and interests in and under the 2015 Agreement in July 2015, and because the 2019 Assignment does not confer any rights on American Star or American Star SPE-2, LLC, there is no genuine issue of material fact, and Pulte is entitled to judgment as a matter of law as to the claims of American Star. American Star had no standing and was not the real party in interest for the claims asserted at the time suit was filed and did not establish an issue of fact that it acquired an interest or right under the 2015 Agreement during the pendency of the proceeding by virtue of the 2019 Assignment.

- II. The Court grants Pulte’s Motion for Summary Judgment on Plaintiffs’ third cause of action for a declaratory judgment on the provision in the 2015 Agreement addressing the split of the net proceeds from a possible future condemnation on the ground that this question is not ripe.

“[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.” Colleton Cty. Taxpayers Ass’n v. Sch. Dist. of Colleton Cty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). Stated differently, “[a] justiciable controversy is a real and substantial controversy

which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” Pec Dee Elec. Co–Op, Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); see also, Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 227, 467 S.E.2d 913, 917–18 (1996).

Here, the third cause of action in the Amended Complaint seeks a declaration that Pulte is bound by a provision in the 2015 Agreement obligating the “buyer” to split net proceeds with Plaintiffs from a possible future condemnation of any part of the Primus Property for a road right-of-way. It is undisputed that no portion of the Primus Property has been condemned. Plaintiffs have not submitted any evidence that a condemnation is imminent.

Plaintiff argues that because it seeks a declaratory judgment, the issue is ripe. However, seeking a declaratory judgment does not obviate the ripeness requirement. To the contrary, even when seeking a declaratory judgment, ripeness of the controversy is required. See Peoples Fed. Sav. and Loan Ass’n of S.C. v. Resources Plan. Corp., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004); Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985) (noting that declaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination). An allegation that there may be a dispute in the future if there is ever a condemnation is simply insufficient to warrant the court court’s review. See Kiawah Prop. Owners Group v. The Pub. Serv. Commn. of S.C., 357 S.C. 232, 243, 593 S.E.2d 148, 154 (2004) (“Here, it is patent there is no present, justiciable controversy. Owners assert only that the loan provisions may have some negative impact in the future. This is simply insufficient to warrant this Court’s review.”).

In his affidavit, Brian Harvin states that the Town of Mt. Pleasant is in the process of planning the extension of Hungryneck/Billy Swails Boulevard, beginning land acquisitions and

beginning construction activities. Harvin does not assert that the Town's plan includes condemnation of any portion of the Primus Property. Plaintiffs' Memorandum of Law in Opposition to the Motion for Summary Judgment makes clear there is nothing more than a contingent, hypothetical or abstract dispute by stating that the Town's land acquisitions "*could* include part of the Primus Property" Pls. Mem. Opp. Summ. J., 10 (double emphasis added).

Plaintiffs also assert that they allege the obligation to share condemnation proceeds runs with the land and Pulte is in the process of selling lots, so the issue is ripe. A review of the Amended Complaint shows no allegation that any alleged any right runs with the land. Therefore, the Court rejects this argument. Additionally, even if there were such an allegation, it would further demonstrate why it is inappropriate for the Court to weigh in on this hypothetical dispute over possible future condemnation proceeds. If the alleged right runs with the land and properties are being sold prior to any condemnation, then it is hypothetical whether there will be any dispute between Pulte or unknown purchasers, and Plaintiffs.

Therefore, until the Primus Property, or a portion thereof, is condemned, or a condemnation is imminent, there is nothing more than a contingent, hypothetical or abstract dispute, and the issue presented by the third cause of action is not ripe for determination.

III. The Court denies Pulte's Motion for Summary Judgment that Plaintiffs cannot proceed on the remedy of specific performance because Plaintiffs have an adequate remedy at law.

In the Amended Complaint, Plaintiffs seek an order of specific performance requiring Pulte to design and construct a connection street or, alternatively, damages for the loss in value of the properties bearing TMS #578-00-00-005 and #578-00-00-006 (the "Adjacent Property") that American Star alleges it owns.

A court may order specific performance if: (1) a valid contract exists between the parties; (2) no adequate remedy at law exists for the breach; (3) specific performance is equitable between the parties; and (4) no fraud, accident, or mistake infects the contract. Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 281, 672 S.E.2d 816, 819 (Ct. App. 2009) (King v. Oxford, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct. App. 1984)).

Pulte asserts that Plaintiffs' claim for specific performance is barred as a matter of law because Plaintiffs have alleged they are entitled to damages for the same alleged breach, and consequently have an adequate remedy at law.

In response to the motion, Plaintiffs argue that they are entitled to maintain actions for breach of contract seeking both specific performance *and* for damages to fully compensate them for the alleged breach.

The only case cited by Pulte during the hearing or in its memorandum in support of its argument that Plaintiffs are not entitled to specific performance because there is an adequate remedy of damages is *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (1984). However, *King* does not support the issuance of summary judgment. In that case, the Court of Appeals ruled that the trial court erred in prematurely decreeing specific performance because it failed to determine other issues related to the contract in question. *Id.* at 314, 318 S.E.2d at 129. The *King* court went on to state that if specific performance was denied then the plaintiff may pursue remedies of damages for breach of contract. *Id.* at 315, 318 S.E.2d at 130. Thus, *King* actually supports denial of summary judgment in this case until a complete record is developed to determine whether specific performance is appropriate.

In addition, well-established principles of contract law dictate that the availability of damages does not mean that they will be adequate to preclude specific performance. The issue of

adequacy of damages is relative and requires a comparison of “remedies to determine which is more effective in serving the ends of justice.” *Restatement 2d of Contract* § 359. In determining whether the remedy in damages would be adequate, the following circumstances are significant: (a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected. *Restatement 2d of Contract* § 360. Significantly, “the damage remedy may be inadequate to protect the injured party’s expectation interest because the loss caused by the breach is too difficult to estimate with reasonable certainty.” *Id.*

Pulte’s argument also disregards that the “law is clear, however, that one can recover both specific performance and the damages resulting from the delay in performance.” *Perry v. Green*, 313 S.C. 250, 253, 437 S.E.2d 150, 153 (Ct. App. 1993) (citing *White v. Felkel*, 225 S.C. 453, 459, 82 S.E.2d 813, 816 (1954)).

In this case, Pulte has not established its burden of proving that damages would provide an adequate remedy to Plaintiffs’ alleged injury. Plaintiffs seek a connection for access to its adjacent property, and an award of damages will not adequately provide the access that it seeks. Pulte offered evidence that access may be provided in the future through other means, but damages will not remedy the loss of use and access during the interim period. Moreover, Plaintiffs argued that any such damages would be difficult to prove to a reasonable certainty, which Pulte denied. Yet the present posture of this case where discovery is ongoing prevents the Court from resolving this dispute and ruling as a matter of law that damages will provide an adequate remedy to Plaintiffs for Pulte’s alleged breach of contract.

Instead of proving that damages would be adequate, Pulte argues that specific performance should be denied because Plaintiffs have pleaded an alternative remedy in damages. *King*

illustrates that pursuit of these alternative remedies is permissible and that one option should not be foreclosed on an incomplete record. Therefore, Plaintiffs' alternative claim for damages, especially prior to trial, does not preclude their action for specific performance, and Pulte's motion for summary judgment on the claim for specific performance is denied.

- IV. The Motion for Summary Judgment on the claims for failure to design and construct the connection street because none of the Plaintiffs own the Adjacent Property is granted against American Star and denied as to the other two Plaintiffs.

The Court also grants summary judgment as to American Star with regard to the claim that Pulte should be required to build the road connecting the Adjacent Property to its property because American Star has never owned the Adjacent Property. It is undisputed that American Star never owned the Adjacent Property and, therefore, could not have suffered loss to the value of the Adjacent Property because of the failure to construct the connection street.

In support of the Motion or Summary Judgement, Pulte submitted the affidavit of Matthew Raines which sated as follows in paragraph 10:

Attached hereto as Exhibit 2 is a true and accurate copy of a is the deed for the Adjacent Property dated January 16, 2018, from Plaintiffs KKMC Investments, LLC, and 211, LLC, as grantors, to American Star SPE-2, LLC, as grantee, recorded at Book 0694 at Page 448 in the ROD Office for Charleston County. Based on my review of the real property records on line, title for the Adjacent Property remains in American Star SPE-2, LLC, and has never been in American Star Development SC, LLC.

American Star has offered no evidence controverting Raines' affidavit or the deed attached thereto. In fact, Brain Harvin's affidavit, offered by Plaintiffs, is consistent with Raines' and explains in paragraph 8 that after American Star contracted to purchase the Adjacent Property, it assigned that contract to 211, LLC and KKMC Investments, LLC and those entities acquired the Adjacent

Property. As further stated in Harvin's affidavit, 211, LLC and KKMC Investments, LLC later transferred the Adjacent Property to American Star SPE 2, LLC.

Therefore, because the undisputed fact is that American Star does not own, and never owned, the Adjacent Property, the Court grants summary judgment to Pulte as to American's Star's claim that it has been damaged by alleged failure to build a road providing access to the Adjacent Property.

As to 211, LLC and KKMC Investments, LLC, the Court denies the Motion for Summary Judgment because, as explained above, those entities owned the adjacent properties prior to transferring title to American Star SPE 2, LLC. As explained above and in the Court's Order on Plaintiffs' Motion to Substitute Parties and Amend the Amended Complaint, American Star SPE 2, LLC will be substituted and litigate the interests in 2015 Agreement assigned it by 211, LLC and KKMC Investments, LLC. Consequently, the Court denies the Motion for Summary Judgment on the ground that these two entities no longer own the Adjacent Property. The Court will allow the claim to be prosecuted by American Star SPE 2, LLC, in its separate Order allowing it to be substituted for Plaintiffs 211, LLC and KKMC Investments, LLC.

Therefore, the Motion for Summary Judgment on this ground is granted as to American Star, but denied as to the other two LLCs which have transferred their rights to American Star SPE 2, LLC, the current owner of the Adjacent Property.

V. The Motion for Summary Judgment on the claims for failure to design and construct the connection street based on the statute of limitations is denied without prejudice.

According to the affidavit of Raines in support of Pulte's Motion for Summary Judgment, Plaintiff American Star submitted a site plan dated February 18, 2015, to the Town of Mount Pleasant that did not show the connection street. The Raines Affidavit attaches the annexation and

zoning ordinance that included adoption of this site plan without the connection street as the master plan for the planned development district for the Primus Property. Pulte argues that Plaintiffs knew or should have known at the time it submitted the site plan that there would be no connection street. This date is more than three years before this suit was filed.

In response, Plaintiffs argue that it is premature to make this determination because discovery is far from complete and no depositions have been taken.

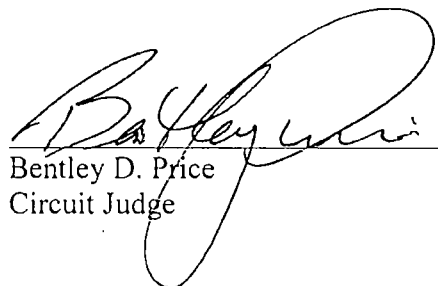
Although in some instances the determination of whether the statute of limitations applies can be made as a matter of law, the Court agrees with Plaintiffs and finds the question of the application of the statute of limitations should be decided on a more expansive factual record. The Court denies Pulte's Motion for Summary Judgment on the basis of statute of limitations without prejudice with leave to refile it when the factual record is more developed.

**CONCLUSION**

Therefore, for the reasons explained above, Pulte's Motion for Summary Judgment is GRANTED in part and DENIED in part.

**AND IT IS SO ORDERED!**

June 11, 2019  
Charleston, South Carolina

  
Bentley D. Price  
Circuit Judge

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**  
**GRANTING PLAINTIFFS'**  
**MOTION FOR**  
**RECONSIDERATION**

FILED  
2019 JUL - 8 PM 3:55  
JULIE J. WOOD  
CLERK OF COURT

This matter is before the Court on Plaintiffs' Motion for Reconsideration of the Order granting in part and denying in part the Motion for Summary Judgment of Defendants Pulte Home Corporation, n/k/a Pulte Home Company and PulteGroup, Inc.'s (collectively, "Pulte") signed and entered June 14, 2019.

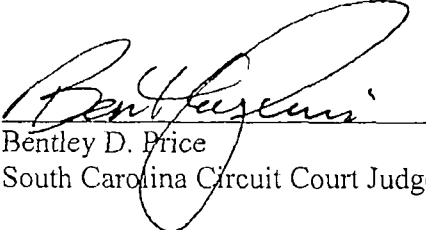
Having considered the arguments in the Motion for Reconsideration, the Court finds that there is a sufficient justiciable controversy under South Carolina's Uniform Declaratory Judgments Act, S.C. §§ 15-53-10 et seq., to support the third cause of action in the Amended Complaint for declaratory relief.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion for Reconsideration is granted on the basis that, considering the record in the light most favorable to Plaintiffs, there is a justiciable controversy as to the third cause of action in the Amended Complaint;

IT IS FURTHER ORDERED that Section II of this Court's Order of June 14, 2019, is vacated, and Pulte's Motion for Summary Judgment as to the third cause of action in the Amended Complaint is denied.

AND IT IS SO ORDERED.

July 8<sup>th</sup>, 2019  
Charleston, South Carolina

  
Bentley D. Price  
South Carolina Circuit Court Judge

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**  
**ON PLAINTIFFS' MOTION TO**  
**SUBSTITUTE PARTIES AND**  
**AMEND AMENDED COMPLAINT**

FILED  
 19 JUL -8 PM 3:23  
 CLERK OF COURT

This matter came before the Court on May 28, 2019, on Plaintiffs American Star Development SC, LLC's ("American Star"), KKMC Investments, LLC's and 211, LLC's (collectively, "Plaintiffs") Motion to Substitute and Amend Amended Complaint. Plaintiffs filed their Motion on March 5, 2019, more than a month after Defendants Pulte Home Corporation, n/k/a Pulte Home Company and PulteGroup, Inc. filed their Motion for Summary Judgment. E. Brandon Gaskins appeared on behalf of Plaintiffs, G. Trenholm Walker and John P. Linton, Jr. appeared on behalf of Defendants Pulte Home Corporation, n/k/a Pulte Home Company and PulteGroup, Inc. (collectively, "Pulte"), and John A. Massalon appeared on behalf of Defendant JW Homes, LLC. For the reasons explained herein, the Court GRANTS the Motion in part and DENIES the motion in part.

**BACKGROUND**

American Star filed a Summons and Complaint against the Defendants on April 26, 2018, and an Amended Complaint (adding the two additional Plaintiffs) on May 1, 2018. Plaintiffs allege

that “[o]n February 25, 2015, American Star and JWH Acquisitions entered into an Agreement for Purchase and Sale . . . wherein American Star agreed to sell to JWH Acquisitions” the “Primus Property” located in Mt. Pleasant South Carolina, for \$8,332,000. The Plaintiffs base their entire lawsuit on the terms of this contract (the “2015 Agreement”).

According to the allegations of Paragraph 16 of the Amended Complaint, “[s]ubsequent to entering into the Agreement but before the closing on the purchase of the Primus Property, JWH Acquisitions assigned its rights, obligations, and interest under the Agreement to JWH, and American Star assigned its rights, obligations, and interest under the Agreement to 211, LLC and KKMC Investments, LLC.”

The Amended Complaint further alleges that JW Homes, LLC, as assignee of JWH Acquisitions, LLC, closed on the purchase of the Primus Property on July 31, 2015. According to the allegations of the Amended Complaint, six months later, JW Homes, LLC, sold the Primus Property to Pulte Home on January 14, 2016, as part of a larger asset sale. The Amended Complaint asserts that Pulte assumed the obligations of the JWH Acquisitions, LLC, and JW Homes, LLC, under the 2015 Agreement.

Plaintiffs seek to amend to substitute American Star SPE-2, LLC as the sole Plaintiff. According to the Affidavit of Matthew Raines submitted in support of Pulte’s Motion for Summary Judgment and the deed attached thereto, as well as Affidavit of Brian Harvin submitted in opposition to Pulte’s Motion for Summary Judgment, American Star SPE-2, LLC is the owner of the property adjacent to the Primus Property. The Affidavit of Harvin also establishes that American Star never owned the adjacent property and “assigned its contractual right to purchase the Adjacent Property to its affiliated companies, KKMC Investments, LLC and 211, LLC, which purchased the Adjacent Property.” Affidavit of Harvin, ¶ 8.

Plaintiffs accompanied their Motion with an “Assignment of Claims and Agreement” entered February 27, 2019 (the “2019 Assignment”). In the 2019 Assignment all three Plaintiffs purport to assign to American Star SPE-2, LLC, their rights under the 2015 Agreement as well as “all of their rights, title, and interests in and to any and all claims, counterclaims, actions, causes of action, lis pendens, appeals, defenses, demands, or offsets which Assignors have or may have against PulteGroup, PHC, JWH and their successors and assigns that arise out of or relate to the Legal Action [this lawsuit], including those relating to the Connection, the Primus Property, and the Purchase Agreement.”

In addition to seeking to substitute American Star SPE 2, LLC, as the sole Plaintiff, the existing Plaintiffs also seek to amend the allegations of the Amended Complaint “clarifying the relief sought in the causes of action.” The proposed Second Amended Complaint attached to Plaintiff’s Motion makes substantive changes that include seeking additional relief that was not part of the Amended Complaint.

#### **APPLICABLE LEGAL STANDARD**

Under Rule 15(a), SCRCF, “. . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15 (d), SCRCF, addresses “Supplemental Pleadings” as follows:

**(d) Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

The event that gives rise to the request for substitution of parties happened after the Amended Complaint was filed. Even though a supplemental pleading is technically different from a motion to amend the pleadings, the standard for granting or denying these motions is the same. See Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (S.C. 1999).

“Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend.” Patton v. Miller, 420 S.C. 471, 491–92, 804 S.E.2d 252, 262–63 (2017), *reh'g denied* (Sept. 27, 2017) (citing Lee v. Bunch, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007) (“The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it.” (citing Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005))); Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235-36, 754 S.E.2d 714, 719 (Ct. App. 2014) (affirming the denial of a proposed amendment after the conclusion of discovery and the case had been placed on the trial roster because it would cause significant delay and impose substantial additional discovery costs that would not have been necessary if the plaintiff had timely made the motion to amend)).

Rule 25(c), SCRCP provides that “[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . .”

#### DISCUSSION

After reviewing the Motion and Proposed Second Amended Complaint, the Court grants the Motion to Substitute American Star SPE-2, LLC as the sole Plaintiff in substitution for KKMC Investments, LLC and 211, LLC. The Court denies the Motion to Substitute as to Plaintiff

American Star. By separate order, the Court has granted Pulte's Motion for Summary Judgment on the claims for American Star for lack of standing; therefore, American Star is no longer a Plaintiff.

However, all three current Plaintiffs shall remain parties to the case as Counterclaim Defendants in the event that Pulte reasserts its counterclaim against them in its answer to the Second Amended Complaint. Since American Star SPE-2, LLC is stepping into the shoes of KKMC Investments, LLC and 211, LLC, it too may be a Counterclaim Defendant in addition to being the sole Plaintiff. "As a matter of law, an assignor remains liable to the obligor for the assignee's defective performance, just as he would be liable for his own defective performance." Orange Bowl Corp. v. Warren, 300 S.C. 47, 50, 386 S.E.2d 293, 295 (Ct. App. 1989). Furthermore, "[i]n South Carolina, it is well established that an 'assignee ... stands in the shoes of its assignor ...'" Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994).

The Court also grants the motions with respect to amending the Amended Complaint to include allegations concerning the alleged assignment of interests and claims to American Star SPE 2, LLC, that establishes it as the real party in interest with respect to the claims now being asserted by Plaintiffs KKMC Investments, LLC and 211, LLC.

In addition to seeking to amend the Amended Complaint to add allegations concerning the assignment of right to the proposed American Star SPE-2, LLC, Plaintiffs seek to "clarify" the relief sought in the complaint by adding allegations seeking an easement and allegations requesting the Court order the recording of a document confirming the alleged right to share in possible future condemnation proceeds . Pulte has argued that it would be prejudiced by the addition of these new claims for relief.

Plaintiffs filed a Lis Pendens, Amended Lis Pendens, and Second Amended Lis Pendens on 46 separate lots owned by Pulte (collectively, the “Lis Pendens”). Pulte moved to cancel the Lis Pendens. Judge McIntosh granted the motion and issued an order cancelling the Lis Pendens on November 14, 2018, filed on November 16, 2018. In cancelling the Lis Pendens, Judge McIntosh ruled that the Lis Pendens was improper because the allegations of the Amended Complaint did not affect title to real property, in part because the Plaintiffs did not seek to establish an easement:

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:...

Order filed November 16, 2018, p. 4. Judge McIntosh also ruled that American Star’s claim for a declaratory judgment that it is entitled to a share of any possible future condemnation proceeds was a contractual claim, rather than a claim affecting title to real property. See Order filed November 16, 2018, p. 5.

American Star appealed this order to the South Carolina Court of Appeals. The initial briefs of the Appellant American Star and Pulte have been filed with the Court of Appeals based on Judge McIntosh’s Order and the allegations of the Amended Complaint at the time of the ruling.

Pulte asserts it will be prejudiced by adding these new claims<sup>1</sup> because it has already litigated the issue of whether the Amended Complaint affects title to real property, obtained a favorable ruling, and spent considerable time and incurred considerable fees both in obtaining the Order and responding to the appeal. For purposes of the Order on appeal, the proposed amendments to assert claims to establish an easement and record a document confirming the alleged right to share in possible future condemnation proceeds come after the previous ruling of the Court on the issue of the propriety of the Lis Pendens.

The parties recognized in their arguments at the hearing that it is now undisputed that the Town of Mount Pleasant has settled on three alternatives for the location of the right-of-way of the future Billy Swails Parkway, none of which crosses any of the residential lots. Additionally, since the hearing, the parties have informed the Court (i) that Plaintiffs have filed a Third Amended Lis Pendens that does not seek to encumber any of the residential lots and (ii) that Plaintiffs have taken the position in their Reply Brief on the appeal that the question of the validity of the lis pendens with respect to the declaratory judgment on Plaintiffs' alleged right to condemnation proceeds is moot because of the three remaining alternatives for the future right of way.

Our Court of Appeals has stated the test for allowing an amendment as follows:

Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge. See Rule 15(b), SCRCP. Ordinarily, amendments to conform to proof should be liberally allowed. However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment. Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.

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<sup>1</sup> Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17-18, 567 S.E.2d 881, 889-90 (Ct. App. 2002) (noting that actions to establish the existence of an easement affect title to real property and other types of actions affecting title to real property).

Ball v. Canadian Am. Exp. Co., Inc., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994)  
(internal citations omitted).

Pulte argues these new requests for relief would prejudice it after having extensively litigated the question of the validity of the lis pendens before this Court and before the Court of Appeals. The Court agrees that the addition of the claim of an easement would prejudice Pulte's appeal and denies the request to assert this new claim. On the other hand, the Court will allow the amendment seeking an order requiring the recording of a document confirming the alleged right to share in possible future condemnation proceeds provided the real property subject to the instrument must be within the right-of-way of the three remaining alternatives and not include any of the residential lots.

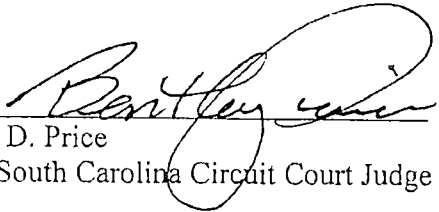
#### CONCLUSION

Therefore, for the reasons explained above, the Motion to Substitute is GRANTED as to the substitution of American Star SPE 2, LLC as Plaintiff for Plaintiffs KKMC Investments, LLC and 211, LLC, but not for Plaintiff American Star Development SC, LLC, and that all three Plaintiffs may remain as parties as Counterclaim Defendants;

It is further Ordered that the Motion to Amend the Amended Complaint is GRANTED, except that the substitute Plaintiff shall not be allowed to assert a claim for an easement and that the claim to record an instrument giving notice of the alleged right to share condemnation proceeds shall be limited to the real property within the right-of-way of the three remaining alternatives for the future Billy Swails Boulevard and does not include any of the residential lots.

**AND IT IS SO ORDERED!**

July 9<sup>th</sup>, 2019  
Charleston, South Carolina

  
Bentley D. Price  
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

Appellate Case No. 2018-002277

**RECEIVED**  
AUG 06 2019  
SC Court of Appeals

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.

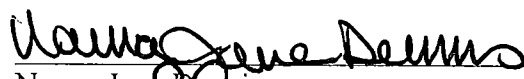
**PROOF OF SERVICE**

I certify that I have served the **Respondent's Return to Appellant's Motion to Substitute Parties** by depositing a copy in the United States Mail, postage prepaid, on August 5, 2019, addressed to the attorneys of record:

E. Brandon Gaskins, Esq.  
Charles R. Scarminach, Esq.  
Moore & Van Allen PLLC  
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Nancy Jane Dennis  
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NANCY JANE DENNIS  
Direct: 843.727.2222  
Email: [njdennis@WGFLAW.com](mailto:njdennis@WGFLAW.com)

August 5, 2019

US MAIL [X] FEDERAL EXPRESS[]

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

**RECEIVED**  
AUG 06 2019  
SC Court of Appeals

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 Return to Appellant's Motion to Substitute Party with Proof of Service.

Your courtesies and consideration of this matter are greatly appreciated.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC



Nancy Jane Dennis  
Paralegal

Enclosures (Return and Proof)

c: E. Brandon Gaskins, Esq.  
John A. Massalon, Esq.  
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AUG 06 2019

SC Court of Appeals

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

