

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 No. 2018-002277

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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.

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

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February 11, 2019
Charleston, South Carolina

Respondent, Pulte Home Corporation, n/k/a Pulte Home Company, LLC (“Pulte” or “Respondent”), respectfully submits this Reply to American Star Development SC, LLC’s (“American Star” or “Appellant”), Return to Pulte’s Petition for an Order Lifting Automatic Stay. As explained herein and in the Petition, the Court should grant the Petition and lift the automatic stay of the Order entered November 16, 2018, that cancelled American Star’s Lis Pendens, as amended. Lifting the automatic stay will prevent the relief ordered by the lower court from becoming moot and will not moot the issues on appeal. Additionally, lifting the automatic stay will prevent the continuing irreparable harm from the Lis Pendens to Pulte and the persons who have contracted to buy the lots with homes encumbered by the Lis Pendens.

REPLY ARGUMENT

Throughout its Return, American Star asserts the issues it raises on appeal will become moot if the automatic stay is lifted and the Lis Pendens is cancelled. American Star also does its best to minimize the harm if the Lis Pendens remains in place for the two or more years this appeal could take, describing the harm to Pulte and its contract purchasers who cannot close as “relatively minor delays and monetary injuries.” (**Return, 1**). Both of these assertions are gross simplifications and incorrect.

Despite claiming in its Return that it previously owned the Primus Property, American Star never owned the Primus Property and assigned all its rights under the 2015 Agreement that is the basis for Plaintiffs’ claims before the sale occurred according to the allegations of its Amended Complaint, as shown in Pulte’s Petition. See (Pet., 14). Further, as covered in Pulte’s Petition, 44 of the 46 lots that are subject to the Lis Pendens have nothing to do with the alleged connector street. See (Pet., 6). They concern American Star’s request for a *declaratory relief* against Pulte

that it has the obligation under the 2015 Agreement to pay American Star a portion of the net proceeds from a possible future condemnation award.

As discussed in Pulte's Petition and as determined by the lower court in the Order, the Lis Pendens was unlawfully filed because none of the Plaintiffs brings a single claim affecting title to any real property. See (Pet., 7-8). Since the claims do not affect an interest in real property, the relief sought by American Star cannot be mooted. This Court's decision will still afford effectual relief if the automatic stay is lifted. On the other hand, leaving the automatic stay in place will render the relief granted Pulte in the Order completely ineffective – the Lis Pendens will have remained in place without bond or other security preventing the closings of all 46 lots during the entire course of the appeal. American Star's argument completely overlooks this mootness of the relief sought by Pulte in its original motion if the automatic stay remains in effect.

American Star asserts that the automatic stay should not be lifted because if it prevails on the appeal, the purchasers of any of the 46 lots will be subject to American Star's underlying claims. That presumes, incorrectly, that American Star is asserting some interest in the land comprising the 46 lots. As the lower court held in the Order, American Star's Amended Complaint does not make allegations of an interest affecting the title to the Primus Property or the 46 lots.

More specifically, American Star conveniently omits that the hypothetical purchasers of 44 of the 46 lots would not be subject to American Star's claims if it prevails. American Star encumbered 44 of the 46 lots in association with its declaratory judgment claim against Pulte for a determination of whether it has the *contractual right to proceeds* from a possible future condemnation of land that has already been set aside for the future right of way. This declaratory judgment claim can never involve the purchasers of those lots. American Star seeks no relief against them nor the 44 lots, only a declaratory judgment against Pulte.

This Court should reject American Star's cavalier view of the lis pendens statute. Essentially, American Star claims "no harm, no foul" if it loses the appeal because the Lis Pendens remaining in place, even if unlawful, only results in notice of lawsuit to purchasers of the 46 lots it encumbers. In fact, it is widely recognized that "[g]enerally, the filing of a [notice of] lis pendens *places a cloud on title which prevents the owner from freely disposing of the property* before the litigation is resolved." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) (double emphasis added). As explained in the Petition, because the Lis Pendens places a cloud on title preventing real estate closings, the contested issue of the legality of the Lis Pendens will be moot if it is allowed to stay in place until the end of the appeal. See (Pet., 8-10) (discussing Pulte's extensive development efforts and the numerous sales thwarted by the unlawful lis pendens remaining in effect during the appeal); see also. (Pet., 12-13).

This case presents the precise situation for which Rule 241 provides relief. "If the lis pendens is allowed to stay in place for the course of this appeal, then the Court's order that the lis pendens was not in compliance with South Carolina law will be rendered moot in that Plaintiffs will have received exactly what they are not entitled to, namely a lis pendens during the course of this litigation that would hinder" the sale of Pulte's lots. See (Pet., at Ex. 17) (Carolina Park, LLC. V. Marino, C/A No. 2010-CP-6042). If American Star's position were adopted by this Court "[a] lis pendens would never be subject to effective cancellation, and orders cancelling a lis pendens would be rendered moot." Id.

Nowhere in its Return does American Star assert that its alleged claims or requests for relief affect the title to the 46 lots that are subject to the Lis Pendens. In fact, as noted previously, American Star, the only Plaintiff that appealed the decision, admittedly has no claims against Pulte

based on the 2015 Agreement that is the source of the obligations it is seeking to impose.¹ Because Appellant holds no rights under the 2015 Agreement and has asserted no claim affecting title to any property, lifting the stay will not moot the issues on appeal. The lis pendens statute only provides notice in “an action affecting the title to real property.” S.C. Code § 15-11-10; See also, S.C. Code § 15-11-20 (“ . . . and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action.”).

Rather than addressing the substantive showing made by Pulte in its Petition that lifting the automatic stay will not moot any of the relief sought by American Star, (**Pet., 14-15**), American Star asserts this Court should preserve the “*status quo*,” even if preservation of the “*status quo*” will moot the pre-judgment relief sought by Pulte and granted by the lower court in the Order. In making this argument, American Star relies on a single case, Melton v. Walker, 209 S.C. 330, 331, 40 S.E.2d 161, 161 (1946), which was decided prior to Rule 241, SCACR.² Rule 241 does not mention preservation of the *status quo* and there are no cases finding Rule 241 includes such a

¹ According to the Amended Complaint, “subsequent 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.” (**Pet. at Ex. 5, ¶ 16**). 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.”).

² Rule 241, SCRCF was adopted effective September 1, 1990. Amended effective May 3, 2007; February 5, 2009. Renumbered from Rule 225 effective April 29, 2009.

standard. In fact, American Star's argument is contrary to the language of Rule 241, which provides a process by which this Court can lift an automatic stay—if preservation of the *status quo* were the test, the rule would not contain a process for lifting the automatic stay in the discretion of this Court.

American Star also suggests this Court should not be concerned that the Lis Pendens, and its effectiveness during the appeal, has torpedoed the development of the Primus community.³ American Star argues that because the extent of the harm does not threaten Pulte's parent company's existence, its conduct should be excused along with the harm that would be exacerbated by this Court if it denied the Petition. In addition to diminishing the extent of the tangible irreparable harm, American Star ignores that the very existence of the Lis Pendens is irreparably harming Pulte by placing a cloud on the title of 46 parcels. See generally, Pond Place, at 17, 567 S.E.2d at 889 (“[g]enerally, the filing of a [notice of] lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved.”).

American Star makes no showing in opposition to that made in the Affidavits of Evans and Raines that more than \$10,000,000 has been spent by Pulte in the acquisition and development of this 71-lot community and that none of the 46 lots subject to the Lis Pendens can close because the title insurer will not insure over the cloud on title. See (Pet, at Exs. 8, ¶8 & 16, ¶ 11). American Star does not address the ongoing harm to the contract purchasers who have taken irreversible actions such as selling their houses, terminating leases, moving, etc. in reliance on the closing of the lots with homes that are under contract, as well as Pulte's potential exposure to them.

³ It is worth noting that while American Star's actions have caused substantial irreparable harm, Pulte need not show irreparable harm for the Court to lift the automatic stay. See Rule 241(c)(2), SCACR.

Instead, American Star excerpts one small figure for the litany of harm described in the Affidavits of Evans and Raines to argue that the harm is minimal to Pulte. See (Reply, 5). American Star completely ignores the ongoing unquantifiable harm to the contract purchasers for the lots and homes.

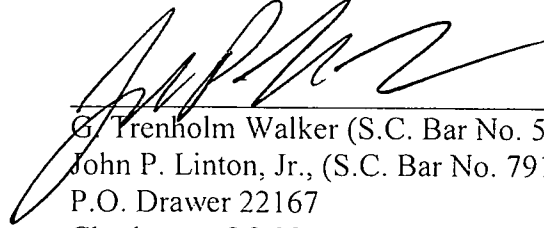
Finally, American Star does not even address Pulte's argument that this Court could partially lift the stay and/or impose conditions on the lifting of the stay. See (Pet., 16-17); see also, Rule 241(c)(3), SCACR (providing the court wide discretion to lift the stay and impose appropriate conditions). As stated in the Petition, to the extent this Court finds that American Star's claims related to the alleged obligation on the buyer of the Primus Property to design and construct the connection road would be mooted if the automatic stay is lifted, this Court has the discretion to lift the automatic stay for all the lots except the two lots that could include the alleged connection road. The removal of the automatic stay on the other 44 parcels cannot moot, and will not moot, American Star's cause of action for declaratory judgment that Pulte has a contractual obligation under the 2015 Agreement to split any net proceeds from a future condemnation with it.

CONCLUSION

Therefore, for the reasons described herein, and in the Petition, Pulte respectfully requests the Court grant the Petition and issue an order lifting the automatic stay and allowing the Circuit Court's Order cancelling the unfounded Lis Pendens to resume effect, or, in the alternative, that it lift the stay except for Lots 54 and 55.

Respectfully submitted,

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PULTE HOME COMPANY, LLC

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Charleston, South Carolina

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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 hereby certify that I have served a true copy of the foregoing **RESPONDENT'S REPLY TO APPELLANT'S RETURN TO RESPONDENT'S VERIFIED PETITION FOR AN ORDER LIFTING THE AUTOMATIC STAY** by delivering copies to the following counsel/parties, in accordance with the applicable Rules of Appellate Procedure, on **February 11, 2019**, by first class mail, postage prepaid, properly addressed to the following:

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February 11, 2019

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SC Court of Appeals

Re: American Star Development v. PulteGroup, Inc.
Appellate Case No. 2018-002277

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Reply to Appellant's Return to Respondent's Verified Petition for an Order Lifting the Automatic Stay and Proof of Service on opposing parties.

Yours very truly,

WALKER GRESSETTE FREEMAN & LINTON, LLC

A handwritten signature in black ink, appearing to read 'Nancy Jane Dennis'.

Nancy Jane Dennis
Paralegal

Enclosures (As Stated)

c: E. Brandon Gaskins, Esq.
Charles R. Scarminach, Esq.
Susan M. Gaddy, Esq.