

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Feb 28 2022**

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2020-001048

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Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers

Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

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PETITION TO LIFT STAY AS TO DISCOVERY AND SUBCONTRACTOR CLAIMS

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Petitioners Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow, (collectively, “Homeowners”), through their undersigned counsel, hereby respectfully submit this Petition to lift the current stay as to Homeowners’ claims against the subcontractor Defendants and related discovery. The stay had been imposed as a result of Lennar Carolina, LLC’s (“Lennar”) Petition to the Court of Appeals, discussed *infra*. On February 8, 2022, Homeowners sought Lennar’s consent to lift the stay, but have received no response as of the date of this filing. Letter to Counsel for Lennar, attached hereto as Exhibit A. This Petition is made pursuant to Rules 240 and 241, SCACR.

#### Brief Summary of Arguments

1. During oral argument, Lennar conceded it cannot force Homeowners to arbitrate claims against the subcontractor Defendants.

**Justice Few:** Do you have the right to force these Plaintiffs to litigate their primary claims against these subcontractors in the arbitration forum despite the fact that they don’t have an arbitration agreement between the two of them?

**James Werner:** No, I don’t think I do have that right.

2. During the entirety of this Appeal, however, Lennar has *repeatedly* taken the exact opposite position, successfully petitioning the Court of Appeals to stay all proceedings against the subcontractor Defendants, including discovery, on the stated ground that Lennar can force Homeowners to arbitrate claims against subcontractor Defendants even where no arbitration agreements exist between Homeowners and the subcontractor Defendants.
3. Lennar has gone so far as to block Homeowners’ ability to settle claims with certain subcontractors Defendants, framing Homeowners’ attempts to do so as “a veiled request of the Court to issue an order lifting the stay of the case.”
4. As result of Lennar’s unjustified procedural maneuvering, Homeowners have not been able to conduct discovery or resolve any claims against the subcontractor Defendants’ for over four years.
5. Because Lennar has now after six years of litigation conceded that it does not have the right to force Homeowners to arbitrate claims against the subcontractor Defendants, the stay should be lifted.

### Relevant Procedural History

On November 18, 2016, Lennar filed its Notice of Appeal. Thereafter, Homeowners sought to proceed with discovery as to the subcontractor Defendants in this case so as to work towards resolving those claims. No agreements exist, arbitration or otherwise, between the Homeowners and the subcontractor Defendants.

On November 29, 2016, Lennar filed a Motion to Enforce the Automatic Stay as to all proceedings. Motion, attached hereto as Exhibit B.

On December 19, 2016, the Court of Appeals issued an order granting Lennar's Motion and finding that (1) the order denying Lennar's Motion to Compel Arbitration was immediately appealable and (2) all matters affected by the appeal were stayed during the pendency of the appeal. Order, attached hereto as Exhibit C.

On February 27, 2018, Homeowners filed a Motion to Lift the Automatic Stay for Purposes of Discovery with the Circuit Court pursuant to Rule 241, SCACR. Motion, attached hereto as Exhibit D. Homeowners sought to lift the stay for the express purpose of conducting discovery as to the subcontractor Defendants while this case was on appeal, noting, *inter alia*, that there are no arbitration agreements between the Homeowners and the subcontractor Defendants in this case, and that discovery conducted with the subcontractor Defendants in this case may lead to settlements that will benefit the Homeowners. Lennar opposed this Motion.

On May 31, 2018, the Circuit Court granted Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery, noting, *inter alia*, that "matters relating to claims against subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. [...] As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors." Order, attached hereto as Exhibit E.

On June 5, 2018, Lennar filed a Petition to Review the Circuit Court's Order Lifting the Automatic Stay, wherein it argued that Homeowners' claims were subject to arbitration regardless of whether the claims were against Lennar or the Subs. Petition, attached hereto as Exhibit F. Specifically, Lennar argued:

As justification for its decision to lift the automatic stay, the circuit court espoused the notion that Rule 205, SCACR, allows that "nothing in these Rules shall prohibit the lower court. . . from proceeding with matters not affected by the appeal." However, the circuit court failed to recognize that the appeal in this case affects the very existence of the case in the circuit court. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Plaintiffs acquired the houses in issue, (b) the property itself, or (c) relating to any personal injury or property damage alleged by Plaintiffs are to be submitted to binding arbitration. **Thus, regardless of whether Plaintiffs make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration because all of the claims arise under and are related to the property and Plaintiffs' claimed injuries and damages sustained because of alleged defects in the properties. There are no claims in the case which are not affected by and at issue in the decision to compel arbitration.**

It has been well recognized by other courts addressing similar issues to those in this case that Lennar's appeal of the circuit court's denial of the Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the circuit court on the underlying claims. See *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011). These same courts have further recognized that discovery in the action should not proceed while the issue of arbitration is being decided. "Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the [circuit] court lacks jurisdiction." *Id.* Arbitration affects the mode of trial and, therefore, discovery is automatically stayed when an arbitrability issue is appealed. See *Bradford-Scott Data Corp. v. PhysicianComputer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (holding that "preparation for trial must be suspended until the court of appeals renders a decision" on an appeal from a denial of a motion to compel arbitration). **In its appeal, Lennar asserts the circuit court erred in not compelling each and every party to this action to arbitration. Therefore, the entire action was removed from the circuit court's jurisdiction and automatically stayed for the duration of Lennar's appeal.** [Emphasis added]

On June 21, 2018, Homeowners filed a Return to Lennar's Petition to Review the Circuit Court's Order Lifting Automatic Stay, again arguing, *inter alia*, that Homeowners' claims against the subcontractors are not affected by the appeal because there were no contracts or binding

arbitration agreements between the Homeowners and subcontractor Defendants. Return, attached hereto as Exhibit G.

On July 30, 2018, the Court of Appeals issued an Order granting Lennar's Petition and staying discovery in this case. Order, attached hereto as Exhibit H.

On August 13, 2018, Homeowners filed a Petition for Full Appellate Court Review of Decision. Petition, attached hereto as Exhibit I. Lennar opposed the Petition, Exhibit J.

On November 13, 2018, the Court of Appeals issued an Order denying Homeowners' Petition for Full Appellate Court review. Order, attached hereto as Exhibit K. As a result, Homeowners have not been able to conduct any discovery as to the subcontractor Defendants or resolve any of those claims for over four years.

On November 8, 2018, Homeowners and two subcontractor Defendants filed a Joint Petition with the Court of Appeals, wherein they sought approval of a partial settlement and limited class certification for the *sole purpose* of settlement approval. Petition, attached hereto as Exhibit L. Lennar sought to block Homeowners' settlement with the subcontractors, framing the Petition as "a veiled request of the Court to issue an order lifting the stay of the case." Return, filed November 18, 2019, attached as Exhibit M. As a result of Lennar's opposition, the Court of Appeals denied Homeowners' Petition. Order, filed November 27, 2019, attached as Exhibit N.

On February 1, 2022, Oral Arguments were held before the South Carolina Supreme Court as to the underlying appeal. During Lennar's portion of the Oral Argument, **Lennar conceded that it did not have a right to force the Homeowners to arbitrate their claims with the Defendant subcontractors, particularly where no arbitration agreements existed between the Homeowners and Defendant Subcontractors.**

**Justice Few (discussing paragraph 16.4 of Purchase and Sale Agreement):**

Well, I'm trying to figure out what it says. And I know you wrote it, but you're not the person complaining about it. But I'm trying to figure out what's different about this arbitration provision that makes it unconscionable.

**James Werner:**

I don't think anything makes it unconscionable. I don't think it is unconscionable

**Justice Few:**

If, on the other hand, the Plaintiffs sue you, you demand arbitration, Plaintiffs have also sued subcontractors as to whom there are no arbitration agreements as I understand it, could you then force the Plaintiffs to litigate their claims against the subcontractors in the arbitration forum?

**James Werner:**

I can bring the subcontractors in to the arbitration forum—

**Justice Few:**

This ain't, I know, I got that, that's the third-party issue I was talking about earlier. Can you pursuant to Paragraph 16.4 force these Plaintiffs to litigate their primary claims against the subcontractors in the arbitration forum despite the fact that there is no arbitration agreement between them?

**James Werner:**

I can argue that to the arbitrator who has the right under this agreement to decide questions of arbitrability.

**Justice Few:**

So yes, but you are defending a claim of unconscionability. It seems to me that you would have an answer to my question. **Because if the answer is yes, you have a far more serious unconscionability problem than if the answer is no.**

**James Werner:**

I, Lennar, have the right to compel them to arbitration, and I have the right to assert claims against others of whom—

**Justice Few:**

That's the third party issue. Chief, I'm going to keep going on this until I get an answer on this if it's ok by you. **Do you have the right to force these Plaintiffs to litigate their primary claims against these subcontractors in the arbitration forum despite the fact that they don't have an arbitration agreement between the two of them?**

**James Werner:**  
**No, I don't think I do have that right.**

**Justice Few:**  
It worked Chief, I got my answer. Thank you sir.

[Oral argument, beginning at minute 31:14, emphasis added]

### DISCUSSION

During Lennar's portion of the Oral Argument, Lennar conceded that it does not have the right to force the Homeowners to arbitrate their claims against the subcontractor Defendants, particularly where no arbitration agreements exist. Lennar previously argued the exact opposite position to both the Circuit Court and the Court of Appeals, attempting to enforce the Purchase and Sale Agreement in a way that divests Homeowners of their right to litigate claims against the subcontractor Defendants. See Procedural History, *supra*. Lennar has gone so far as to block Homeowners' ability to settle claims with certain subcontractors Defendants, framing Homeowners' attempts to do so as "a veiled request of the Court to issue an order lifting the stay of the case." As result of Lennar's unjustified procedural maneuvering, Homeowners have not been able to conduct discovery or resolve any claims against the subcontractor Defendants' for over four years.

Given Lennar's change of position, Homeowners respectfully petition this Court to lift the current stay so as to allow Homeowners to conduct discovery and pursue claims against the subcontractor Defendants in this matter. These are not matters affected by the appeal. Rule 205, SCACR. Allowing Lennar to enforce the Purchase and Sale Agreement in a way that divests Homeowners of their right to litigate claims against subcontractor Defendants—as Lennar has *repeatedly* tried to do during the entirety of this appeal until confronted during oral argument—would result "in a far more serious unconscionability problem."

## CONCLUSION

For over the past four year, Homeowners have been barred from conducting discovery or resolving claims against the subcontractor Defendants due to Lennar's contention that Homeowners claims against the subcontractor Defendants are subject to arbitration. Meanwhile, Petitioners' homes continue to deteriorate. For the reasons stated hereinabove, Homeowners respectfully request that this Court lift the stay and allow Homeowners to conduct discovery as to the subcontractor Defendants and pursue those claims.

Respectfully submitted,

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February 28, 2022

Charleston, South Carolina