

IN THE STATE OF SOUTH CAROLINA

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In the Supreme Court

Mar 08 2022

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

Civil Action No.: 2014-CP-08-2424

Appellate Case No. 2020-001048

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Geometrics 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, Isidru 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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**RETURN TO PETITIONERS’  
PETITION TO LIFT STAY  
AS TO DISCOVERY  
AND SUBCONTRACTOR CLAIMS  
ON BEHALF OF RESPONDENTS  
COASTAL CONCRETE SOUTHEAST, LLC,  
COASTAL CONCRETE SOUTHEAST II, LLC,  
KNIGHT’S CONCRETE PRODUCTS, INC., AND  
KNIGHT’S REDI-MIX, INC.**

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Respondents Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Knight’s Concrete Products, Inc., and Knight’s Redi-Mix, Inc. (hereinafter collectively “Coastal and Knight’s”) oppose Petitioners’ Petition to Lift Stay as to Discovery and Subcontractor Claims and would show that it should be denied as to Coastal and Knight’s for the following reasons.

**PROCEDURAL BACKGROUND**

Petitioners (hereinafter collectively “Damico”) are homeowners at a development known as The Abbey at Spring Grove Plantation in Moncks Corner, South Carolina (hereinafter “The Abbey”). Lennar Carolinas, LLC (“Lennar”) developed, constructed, and sold the homes. Lennar subcontracted its work to various subcontractors, including Respondents Coastal and Knight’s.

Damico filed this action on October 30, 2014, alleging construction defects in homes in The Abbey. (ROA pp. 24-43.) In response to Damico’s First Amended Complaint, which was filed November 23, 2015 (ROA pp. 75-108), Lennar filed its Answer on November 25, 2015, in which it asserted third-party claims against Coastal,

Knight's and other subcontractors. (R. pp. 109-64.) Damico has not filed direct claims against Coastal or Knight's.

This is an appeal from the denial of Lennar's motion to compel arbitration. (R. pp. 3-23; 257-70.) Lennar sought to compel both Damico and most of the other defendants to arbitration. (Id.) The trial court denied Lennar's motion by Order filed September 21, 2016. (R. pp. 4-23.) Reconsideration was denied by Order filed October 26, 2016. (R. p. 3.)

On November 29, 2016, Lennar filed a Motion to Enforce Stay in the Court of Appeals. (Pet. to Lift Stay, Exh. B.) Lennar contended that certain motions were set for hearing in the trial court that directly affected issues on appeal. (Id. at p. 5.) The pending motions included Damico's motion for class certification and dispositive motions as to Lennar's cross-claims and third-party claims. (Id.)

Damico did not file an opposition to Lennar's Motion to Enforce Stay. The issue of Damico's potential claims against third-party defendants such as Coastal and Knight's was not brought to the Court of Appeals' attention.

By Order filed December 19, 2016, the Court of Appeals granted Lennar's Motion to Enforce Stay. (Pet. to Lift Stay, Exh. C.) The Court of Appeals ruled that all matters affected by the order on appeal are stayed. Nothing in the Order suggests the Court of Appeals was aware of any issues in the case that were not affected by the appealed order.

On February 27, 2018, Damico filed a Motion to Lift Automatic Stay in the trial court. (Pet. to Lift Stay, Exh. D.) Specifically, Damico requested to continue discovery in the trial court while this appeal is pending. (Id. at pp. 3, 12.)

The trial court granted Damico's motion by Order filed May 31, 2019. (Pet. to Lift Stay, Exh. E.) The trial court lifted the automatic stay to allow discovery to proceed. (Id. at p. 9.)

Lennar filed a petition for supersedeas in the Court of Appeals. (Pet. to Lift Stay, Exh. F.) Damico opposed Lennar's petition, generally arguing that discovery should be allowed to go forward. (Pet. to Lift Stay, Exh. G.)

The Court of Appeals Order filed July 30, 2018, notes that the relief sought was "an order lifting the automatic stay 'for purposes of discovery.'" (Pet. to Lift Stay, Exh. H, ¶ 1.) The Court of Appeals granted Lennar's petition, finding that the trial court lacked jurisdiction to allow discovery to proceed on matters affected by the appeal. (Id. at ¶ 2.) The Court of Appeals denied Damico's request for rehearing by Order filed November 13, 2018.)

The petition before the Court represents Damico's third attempt to avoid the automatic stay. Damico's Petition should be denied as to Coastal and Knight's because Damico has no pending claims against Coastal and Knight's; consequently there is nothing for this Court to stay.

### **ARGUMENT**

In its Petition, Damico contends that Lennar has recently changed its position by conceding at oral arguments that Lennar cannot force Damico to arbitrate its claims against subcontractors like Coastal and Knight's. Respectfully, Lennar's position as to Damico's direct claims against Coastal and Knight's is not controlling. Damico has not identified anything that prevents the homeowners from submitting its direct claims against Coastal or Knight's to a court for a ruling on the issue.

The issue on appeal is Lennar's motion to compel arbitration as to both Damico and subcontractors like Coastal and Knight's. Because the only relevant pending claims are Damico's claims against Lennar and Lennar's third-party claims against Coastal and Knight's, it is not surprising that Lennar's motions to partially lift the stay have been denied. Broad relief permitting discovery to proceed affects not only Damico's direct claims, but also claims by and against Lennar.

Damico has not asserted any direct claims against Coastal or Knight's; nor has Damico sought leave to amend its pleading for that purpose. Damico has not requested a partial stay limited solely to claims to which Lennar is not a party. Consequently, none of the litigation over the stay is material to Damico's potential direct claims against Coastal and Knight's.

Therefore, the question of whether Damico's claims against Coastal and Knight's should be stayed is not properly before this Court. The issue has not been raised to or ruled upon by either the trial court or the Court of Appeals. "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

### **CONCLUSION**

Damico's attempt to lift the stay to proceed with discovery should be denied as to Coastal and Knight's because Damico has not asserted direct claims against Coastal or Knight's. Damico has not sought leave in the trial court to assert direct claims against Coastal or Knight's. Damico did not ask the Court of Appeals to limit its rulings to claims to which Lennar is a party. The issue of whether discovery as to Damico's

potential claims against Coastal and Knight's should proceed is not properly before this Court.

Respectfully submitted,

*s/Brent M. Boyd*

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March 8, 2022