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**Mar 10 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

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Appellate Case No. 2020-001048  
Case No. 2014-CP-08-02424

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, Décor 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, LLC, Third-Party Defendants.

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc. A.C. & A. Concrete, Inc., Knight's Concrete Product, 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, Décor 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

Décor Corporation, Fourth Party Plaintiff

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicholas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz, Castro Hernandez, Divinio Aperecido Corgoshinho, 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 Buetow, Bryan and Cynthia Camara, Mathew Collins, Jonathan and Theresa Douglass, Czara 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  
RESPONDENT DVS, INC.**

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Respondent DVS, Inc., opposes Petitioners' Petition to Lift the Stay as to Discovery and Subcontractor claims as Plaintiff/Respondent/Petitioner has asserted no direct claims against DVS, Inc., has failed to distinguish between subcontractors it has sued from subcontractors sued only by Lennar, Appellant, and believes the Circuit Court on remand following this Court's decision will address the appropriateness of the Stay depending on the ruling of this Court.

**PROCEDURAL BACKGROUND**

On December 12, 2014, the owners filed a Complaint against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC based upon alleged construction defects in the houses. (R. 24). On February 17, 2016, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. 42). On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. 259).

On November 23, 2015, the owners filed their Amended Complaint (the "Amended Complaint"). (R. 75). On November 25, 2015, Lennar timely filed its Answer to Plaintiff's Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. 109).

On March 30, 2016, Lennar Amended its Motion to Compel Arbitration requesting the Circuit Court issue an Order compelling the owners to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. (R. 262). Lennar's Amended Motion to Compel Arbitration (the "Motion") also requested the Circuit Court Compel Arbitration of the subcontractors.

DVS, Inc. filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration filed May 6, 2016. (R. 257).

A hearing on the Motions was held on April 11, 2016. (R. 203).

On September 19, 2016, the Circuit Court issued an Order denying the Motion Compelling the owners to arbitrate. The Circuit Court made the following findings: (1) the Purchase and Sale Agreements, the Lennar Warranty, the Covenants and the Deeds should be read together as a single arbitration provision; (2) the agreements are adhesion contracts; (3) the Lennar Warranty's terms are unconscionable; (4) the Lennar Warranty's terms are not severable from the arbitration provision; (5) the arbitration provisions are ambiguous because they contain references to both the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et*.

*seq. (“SCUAA”), and the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”); (6) the FAA does not apply to the owners’ contracts with Lennar because they only involve intrastate commerce; and (7) the arbitration provisions fail to comply with the SCUAA’s notice requirements. (R. 4). The Circuit Court made no specific or separate findings regarding the Arbitration Agreements between Lennar and the individual subcontractors either sued by Plaintiffs or by Lennar.*

On October 3, 2016, Lennar filed a Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, arguing the Circuit Court erred. On October 16, 2016, the Circuit Court, without further discussion, reasoning or explanation, issued a Form 4 Order Denying Lennar’s Motion to Alter or Amend. (R. 3).

Lennar Appealed and by Order dated June 6, 2020 the Appellant Court reversed the Circuit Court Order Denying the Motion to Arbitrate and Remanded the matter as the Circuit Court had not ruled on the issue of Lennar’s ability to Compel Arbitration as to the subcontractors both those sued by Plaintiffs and those sued only by Lennar.

On May 28, 2021 this Court granted Certiorari to review the decision in *Damico v. Lennar Carolinas, L.L.C.*, 430 S.C. 188, 844 S.E.2nd 66 (Ct. App. 2020). The Petition to Lift the Stay was filed after oral arguments.

### **ARGUMENT**

DVS, Inc. joins in the Brief and arguments and Motions to Stay procedure and history of Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Knight’s Redi-Mix, Inc. as DVS, Inc. has not been sued by the Respondent and Petitioner has failed to distinguish direct claim subcontractors and Third-Party claim subcontractors. In addition the outcome of this Court’s ruling on the arbitration issue will control the issue of the Stay in the Court below. If this

Court affirms the Appellant Court, the lower Court on remand will then rule as to Lennar's ability to compel its subcontractors. One of Lennar's main arguments as outlined in DVS Inc.'s Brief on Appeal is a provision requiring subcontractors to arbitrate if Lennar is in arbitration with homeowner(s). If Lennar prevails to arbitrate, all direct subcontractors may then if so Ordered be compelled to arbitration along with the Plaintiffs. In that case the use of discovery would be inappropriate. If this Court reverses the Circuit Court and no arbitration is required the case on remand will proceed with the likelihood of all parties continuing in Circuit Court without any arbitration as against the subcontractors and all discovery will move forward. To determine the issue of discovery prior to the determination of arbitration is not logical and will result in the misuse of discovery or the repetition of discovery if Lennar is found later not to be entitled to arbitration.

### **CONCLUSION**

The Petition should be denied as to DVS Inc., as Petitioner has made no direct claims against it and the issue of arbitration of DVS Inc., with Lennar is subject to remand as it has not been ruled on by the Court below. In addition the Circuit Court on remand should be entitled to rule on the issue of a Stay as to Lennar, directly sued contractors, and Third-Party subcontractors once this Court has issued its Order as to Petitioner and Appellants obligation to arbitrate. The issues are intertwined.

Respectfully submitted,

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*Attorney for DVS, Inc.*

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