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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2020-001048
Case No. 2014-CP-08-2424

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, Plaintiffs.

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are
Petitioners,

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, Respondent,

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 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, Ernesto M. 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.

LENNAR CAROLINAS, LLC'S
RETURN TO THE PETITION TO LIFT THE STAY
AS TO DISCOVERY AND SUBCONTRACTOR CLAIMS

Respondent Lennar Carolinas, LLC ("Lennar") respectfully submits the following Return to the Petition to Lift the Stay As to Discovery and Subcontractor Claims.

INTRODUCTION

Plaintiffs petition the Court to lift the stay and allow them "to conduct discovery as to the Subcontractor Defendants and pursue those claims." The Petition should be denied and the stay

of the underlying litigation should continue until the Motion to Compel Arbitration is finally resolved.

The underlying case has been, and continues to be stayed because the Court of Appeals properly found that the entire case is "affected" by the pending appeal, and the South Carolina Appellate Court Rules ("SCACR") require the stay of all matters affected by the pending appeal. *See* Rule 205, SCACR; Rule 241(a), SCACR; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016); *see also Black's Law Dictionary*, AFFECT (11th ed. 2019) (defining "affect" as "to produce an effect on; to influence in some way").

Plaintiffs' Petition to Lift the Stay is based upon an incorrect conflation of two separate issues. Those separate and unrelated issues are (1) whether the entire case should be stayed because the entire case is affected by the appeal, and (2) whether Plaintiffs are required to arbitrate their primary and direct claims against subcontractors whom they have sued on such primary and direct claims. The suggestion that Lennar has taken inconsistent positions on the need for and appropriateness of a stay of the underlying litigation pending resolution of the appeal is utterly incorrect. So too is the suggestion that Lennar, by agreeing that it could not force Plaintiffs to litigate their primary claims against subcontractors in the arbitration forum when there is no arbitration agreement between Plaintiffs and the subcontractors, has conceded that Lennar is not entitled to the stay pending conclusion of the appeal in this case.

In this case, Plaintiffs sued Lennar and a limited group of six (6) subcontractors on thirteen (13) collective causes of action. That is to say, Plaintiffs made no specific or targeted allegations against Lennar, or any subcontractor, and instead merely alleged everything and every claim against "Defendants" as an indistinguishable and collective lot. In each claim, Plaintiffs assert that Lennar and all of the subcontractors are jointly and severally liable for construction defects. Plaintiffs never asserted direct or primary claims against any more than the six (6)

subcontractors—despite the fact that Lennar identified and asserted third-party claims against the full set of subcontractors involved in the work which Plaintiffs allege to be defective. Thus, Plaintiffs have never sued or asserted primary claims against most of the subcontractors.

The automatic stay pending appeal in this case remains proper because Lennar moved to compel Plaintiffs to arbitrate their claims pursuant to express arbitration agreements between Plaintiffs and Lennar, and to compel arbitration of Lennar's cross-claims or third-party claims against each of the subcontractors pursuant to the express arbitration agreements in the contracts between Lennar and each subcontractor. In other words, every party in the case is subject to an arbitration agreement and every cause of action in the case will be part of the arbitration. The allegations and claims presented by Plaintiffs all involve Lennar. Furthermore, all issues—whether related to Plaintiffs' claims against Lennar, Plaintiffs' claims against subcontractors or Lennar's claims against each of the subcontractors—are intertwined and inherently and fundamentally affect each other. Thus, allowing Plaintiffs to conduct discovery or to proceed with claims in the case against the subcontractors—against many of whom it has asserted no direct or primary claim—would undeniably affect Lennar (and the other subcontractors).

At issue in this appeal is the fundamental question of whether Plaintiffs will ever be entitled to pursue civil litigation of the claims against Lennar in the courts, and using the discovery provisions of the Rules of Civil Procedure. So too at issue is whether Lennar's third-party claims against the subcontractors will ever proceed in civil litigation in the courts, and using the discovery provisions of the Rules of Civil Procedure. Thus, to allow Plaintiffs, in the meantime while the appeal that will decide these fundamental issues is pending, to use the circuit court and the discovery mechanisms of the Rules of Civil Procedure to gain advantage and very likely to pursue wasteful discovery would be to frustrate the very purpose of the Rules establishing the stay pending

appeal.[1] Avoidance of such circumstances is the precise reason the stay under Rule 241, SCACR, exists. Furthermore, this is precisely why the current Petition to Lift the Stay should be denied. Efforts to lift the stay have been rejected three times previously by the Court of Appeals and, respectfully, the current Petition should be rejected again.

FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2014, Plaintiffs filed a Complaint against Lennar, Spring Grove Development, Inc., and two of Lennar's subcontractors (Volkmar Consulting Services, LLC and Manale Landscaping, LLC) based upon alleged construction defects in the houses. In response to the Complaint, Lennar filed its Answer, Cross-Claims, and a Third-Party Complaint in which Lennar asserted cross-claims and/or third-party claims against six (6) of its subcontractors. Lennar subsequently filed a Motion to Compel Arbitration addressing Plaintiffs' obligations to arbitrate their claims against Lennar and the subcontractors' obligations to arbitrate Lennar's third-party claims against them.

On November 23, 2015, Plaintiffs filed their Amended Complaint (the "Amended Complaint") in which they asserted direct claims against four (4) additional Lennar Subcontractors. In response, Lennar answered the Plaintiffs' Amended Complaint and asserted

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[1] By way of illustration, while Lennar is convinced that the Motion to Compel Arbitration should and will ultimately be granted, an example of why the stay of discovery and other litigation activity is necessary in the meantime is that Lennar is hamstrung in its ability to pursue and participate in discovery because it cannot risk being found to have waived its right to arbitrate by purposefully availing itself of the courts and the civil litigation process. Thus, Lennar is clearly disadvantaged by allowing Plaintiff the use of civil process and discovery which is foreclosed to Lennar. Additionally, if Lennar were to be denied the right to enforce its arbitration agreements it would be back in the civil action where discovery without it has been proceeding. It would be necessary for Lennar to be allowed the discovery foreclosed to it while the appeal was pending and such discovery would necessarily be reopened and repeated at great waste, expense, and disadvantage to perhaps all parties.

additional third-party claims against nineteen (19) more of its subcontractors. Plaintiffs never asserted direct claims against any more than the six (6) subcontractors.

On March 30, 2016, Lennar amended its Motion to Compel Arbitration. The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, Plaintiffs attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Thus, Lennar filed a Motion to Enforce the Automatic Stay with the Court of Appeals pursuant to Rule 205, SCACR.

On December 19, 2016, the Court of Appeals issued an Order enforcing the automatic stay of proceedings in the circuit court.

More than a year later and after all final briefs were filed in the appeal with the Court of Appeals—on February, 27, 2018—Plaintiffs filed a Motion to Lift the Automatic Stay with the circuit court. On April 11, 2018, the circuit court held a hearing on Plaintiffs' Motion to Lift the Automatic Stay and on May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition to Enforce Stay of the Case with the Court of Appeals. On July 30, 2018, the Court of Appeals issued an order reinstating the automatic stay of the case. Thereafter, Plaintiffs petitioned for a Full Appellate Court Review which was denied on November 13, 2018.

Nearly a year later, while the appeal was still pending and awaiting argument at the Court of Appeals, Plaintiffs filed a "Motion for Preliminary Approval of a Settlement" on August 15, 2019 with the circuit court. The purpose of this Motion was to have the circuit court issue an order

approving a class action settlement between Plaintiffs and two subcontractors. There had been no class certification, Plaintiffs did not even have a direct or primary claim against one of the subcontractors, but Lennar did have a pending third-party claim against that subcontractor which was the subject of the appeal which sought to enforce Lennar's right to arbitrate its claims with that subcontractor. After the circuit court refused to schedule a hearing on the Motion (because the Court of Appeals had issued two orders enforcing the automatic stay of the case), Plaintiffs filed a Motion for Limited Remand for Partial Settlement on November 8, 2019. Lennar filed a Return to the Plaintiffs' Motion on November 18, 2019. On November 27, 2019, the Court of Appeals denied Plaintiffs' Motion for Partial Remand.

On February 19, 2020, the Court of Appeals held oral argument on Lennar's appeal, and issued its order on June 10, 2020, reversing the circuit court's denial of the motion to compel the Plaintiffs to arbitration and remanding the issue of whether the subcontractors must be compelled to arbitration to the circuit court. Thereafter, the Plaintiffs filed their Petition for a Writ of Certiorari with the Court.

On May 28, 2021, this Court issued an order granting Plaintiffs' Petition for a Writ of Certiorari. After completing the briefing process, the Court held oral argument on February 1, 2022.

Following oral argument, on February 28, 2022, Plaintiffs filed a new Petition with the Court to lift the stay so that they may pursue discovery while the appeal is pending.

ARGUMENTS

I. Plaintiffs failed to comply with the Rule 241, SCACR, requirements for filing a Petition to Lift the Stay of a Case.

A. Plaintiffs' Petition should be denied on the grounds that it was not first filed with the circuit court and it is not verified by the individual Plaintiffs.

As a preliminary matter, Plaintiffs' Petition to the Supreme Court is defective and should be denied because Plaintiffs failed to comply with the requirements to obtain a lifting of the stay while the appeal is pending as set forth in Rule 241, SCACR.

Leaving aside that Plaintiffs did not satisfy the requirement of Rule 241(d)(1), SCACR, that states that "**[e]xcept where extraordinary circumstances make it impracticable**, an application for an order lifting the automatic stay . . . **must first be made to the lower court or administrative tribunal which entered the order or decision on appeal**," (emphasis added), Plaintiffs did not satisfy the other Rule 241(d)(3), SCACR, requirement that a petition requesting an order lifting a stay be "**verified by the client**." (emphasis added). Plaintiffs' Petition, is not verified by the clients and is facially defective. Accordingly, Plaintiffs' Petition should be denied based upon their failure to comply with the procedural requirements of Rule 241.

B. Plaintiffs provide no justification, and fail to satisfy the applicable standard for lifting the automatic stay under Rule 241(c)(2), SCACR; because they provide no basis to conclude that lifting the stay is necessary (a) to preserve jurisdiction or (b) to prevent a contested issue from becoming moot.

In reviewing a Motion to Lift the Automatic Stay pursuant to Rule 241, SCACR, "the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

Plaintiffs present no justification for lifting the stay under these factors. In fact, Plaintiffs' Petition does not even address these considerations. There are no current issues (outside of whether the case should be compelled to arbitration) related to the preservation of a court's

jurisdiction. Additionally, there is no risk that issues in this action will become moot if the automatic stay remains in place. Plaintiffs provide no basis, or even arguments, to lift the automatic stay based upon the considerations expressly stated in Rule 241(c)(2). Therefore, the Court should deny Plaintiffs' Petition.

II. Plaintiffs' Petition ignores why the stay exists in the first place and attempts to mischaracterize Lennar's prior arguments justifying the automatic stay of the case under Rule 205, SCACR; namely, the stay was and is appropriate because all issues and causes of action in the case are affected by the appeal.

In June 2018 when Lennar argued against the prior circuit court order purporting to allow the automatic stay pending appeal to be lifted—so that Plaintiffs could pursue discovery from subcontractors while Lennar's appeal was pending—it argued that the appeal affected all of the other causes of action in the case. *See* Rule 205, SCACR; Rule 241(a), SCACR (providing that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal" and "[t]his automatic stay continues in effect for the duration of the appeal . . ."). At that time, Plaintiffs had alleged thirteen (13) causes of action against Lennar and only six (6) subcontractors in a purely collective fashion. In turn, Lennar had asserted cross-claims or third-party claims against all subcontractors whose work or materials were implicated in Plaintiffs' non-specific, collective claims and allegations of defects in the properties.

At that time, Lennar had already moved to compel arbitration of Plaintiffs' claims against it and to compel arbitration of its claims against the various subcontractors. Lennar argued that all of the claims in the case were (and would be) affected by the appeal and the arbitration decision. Given Plaintiffs' pleading choices—not having separately and directly sued all of the subcontractors and having made all allegations and claims in a purely collective fashion—this conclusion and argument was absolutely true and correct then and it is now. Lennar stated in its argument that "the circuit court erred in not compelling <u>each and every party</u> to this action to

arbitration." Lennar did not state that each and every claim by each and every party against each and every other party was subject to arbitration. Plaintiffs' claims against Lennar, alleged in a collective fashion against Lennar and six subcontractors, would be arbitrated as would Lennar's claims against all of the subcontractors derived from Plaintiffs' collective allegations and causes of action. The issue was that each party (Plaintiffs, Lennar and subcontractors) would be required to be in the arbitration. Additionally, all of the allegations and all of the claims in the case were entwined and clearly affected the other allegations and claims in the case. This fact is the driving factor requiring the stay in the first place.

On February 1, 2022, at oral argument before the Supreme Court, there was no question about whether a stay of the litigation was appropriate for all of the reasons argued in June 2018. The question which Plaintiffs now seek to fabricate into an inconsistency, and a concession that the case involving the subcontractors should not remain stayed, was merely a question of whether Lennar could force Plaintiffs to bring and pursue separate primary claims against subcontractors in arbitration. Lennar candidly answered that hypothetical question in the negative. However, in the case actually before the Court, Plaintiffs did not allege separate primary claims against the subcontractors. Plaintiffs made only nonspecific collective allegations against both Lennar and just six subcontractors. All of Plaintiffs allegations and causes of action in its Amended Complaint are utterly intertwined—with no separation or delineation of the claims against Lennar and Lennar's claims against the subcontractors. Thus, while this does not mean Plaintiffs are forced to pursue any separate and direct, primary claims they may have against subcontractors in the arbitral forum, it does not mean that the entwined and collective claims should not be released from the stay while the arbitration issues are decided.

III. The continuation of the circuit court proceedings—including any discovery—while the parties await the Court's decision on the arbitration issue defeats the purpose of the appeal and erodes the benefits of arbitration.

It has been well recognized by other courts that the appeal of an order denying a Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the lower court on the underlying claims. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). These same courts have further recognized that discovery in an action should not proceed while the issue of arbitration is being decided by an appellate court. *See id.*; *Bradford-Scott Data Corp.*, 128 F.3d at 506 (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).

The stay of discovery while an appeal of an order denying a motion to compel arbitration is pending is necessary because "allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration." *Id.* Additionally, allowing discovery to proceed while an appeal is pending "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter." *Id.* If the Court holds that the claims against Lennar "are indeed subject to mandatory arbitration, the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process." *Id.*[2]

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[2] Although not binding precedent, in *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626, *1 (S.C. Com.Pl. March 29, 2006), then circuit court judge, now Justice Few had reason to analyze and decide whether the circuit court should permit discovery to proceed while an appeal of arbitrability issues was pending at the Supreme Court. In analyzing whether, and deciding not to allow discovery to proceed pending appeal, then Judge Few noted that there is a "very clear possibility of prejudice and a tactical advantage being enjoyed by one of the parties to an action when it is given access to discovery which would not otherwise be authorized." *Id.*

The ultimate resolution of the appeal and the decision with respect to compelling arbitration of claims will affect the discovery that may be available to the parties in this case. It would prejudice Lennar, and erode the benefits of arbitration, to allow Plaintiffs to engage in discovery with the subcontractor defendants (including the 19 subcontractor defendants against whom Plaintiffs have asserted no claim), when such discovery may not be available or allowed as a result of the resolution of the pending appeal. Accordingly, the Court should deny Plaintiffs' Petition and refuse to lift the stay of the case while the parties await the Court's decision on the arbitration issue.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition to Lift the stay As to Discovery and Subcontractor Claims.

s/James Lynn Werner
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March 10, 2022
Columbia, South Carolina