

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

**RETURN TO PETITIONERS’
PETITION TO LIFT STAY
AS TO DISCOVERY
AND SUBCONTRACTOR CLAIMS
ON BEHALF OF RESPONDENT
GUARANTEED FRAMING, LLC.**

Respondent Guaranteed Framing, LLC (“Guaranteed”) opposes Petitioners’ Petition to Lift Stay as to Discovery and Subcontractor Claims (“Petition”) and would show that the Court should deny the Petition as to Guaranteed for the following reasons.

STATEMENT OF PROCEDURAL HISTORY

This case originates from the October 30, 2014 Complaint filed by homeowner Petitioners (hereinafter collectively “Damico”) alleging defects in the construction of their homes located in The Abbey at Spring Grove Plantation of Moncks Corner, South Carolina (hereinafter “The Abbey”). (R. pp. 24-41.) Damico originally asserted claims against Lennar Carolinas, LLC (hereinafter “Lennar”) as the developer, general contractor, and seller of homes and lots within The Abbey, as well as a handful of subcontractors. *Id.* Damico did not assert any claims against Guaranteed Framing. *Id.* In response to Damico’s November 23, 2015 First Amended Complaint (R. pp. 75-108), Lennar answered and asserted third-party claims against Guaranteed and other subcontractors on November 25, 2015. (R. pp. 109-164.)

On June 1, 2015, Lennar filed a Motion to Compel Arbitration and on March 30, 2016 filed an Amended Motion to Compel Arbitration. (R. pp. 259-269.) The trial court denied Lennar’s motion by Order filed September 21, 2016. (R. pp. 4-23.) Subsequently, the trial court denied Lennar’s Motion for Reconsideration by Order filed October 26, 2016. (R. p. 3.) Lennar

filed a Notice of Appeal on November 16, 2016, and the case was automatically stayed per Rule 241, SCACR. (Lennar's Notice of Appeal filed Sept. 28, 2018.)

Lennar filed a Motion to Enforce the Stay on November 29, 2016, which the court subsequently granted by its Order dated December 19, 2016. (Pet. to Lift Stay, Ex. C.) Damico filed no responsive pleadings. The Order clearly states "all matters affected by this appeal must be stayed during the pendency of the appeal" and, accordingly, "the lower court is deprived of the power to proceed with matters that are affected by the appeal." Id. However, the Order does not specifically address what matters are "affected" by the appeal, instead simply enforcing the stay and preventing the hearing of seventeen (17) motions, a Rule 30(b)(6) deposition, and the continuance of written discovery referenced in Lennar's Motion to Enforce the Stay. (Pet. to Lift Stay, Ex. B.).

On February 27, 2018, Damico filed a motion with the trial court to lift the automatic stay to allow for discovery to continue, which was granted on May 31, 2018. (Pet. to Lift Stay, Ex. E.) Therein Damico acknowledged "[t]here are no alleged arbitration agreements between the Plaintiffs and subcontractor Defendants" (i.e., Guaranteed). (Pet. to Lift Stay, Ex. D.).

Subsequently, Lennar filed a petition for supersedeas with the Court of Appeals on June 5, 2018, seeking review of the trial court's order lifting the stay for the purpose of discovery. (Pet. to Lift Stay, Ex. F.) In its July 30, 2018 Order, the Court of Appeals granted Lennar's petition, finding the trial court lacked power to proceed with matters affected by appeal, namely here, discovery. (Pet. to Lift Stay, Ex. H. at ¶ 2.) Damico's request for a rehearing was denied by an Order filed November 13, 2018. (Pet. to Lift Stay, Ex. K.)

A joint motion for limited remand to the circuit court was filed November 8, 2019, wherein Damico, Manale Landscaping, LLC, and Décor Corporation were seeking remand to

Berkely County for the approval of a partial settlement between the parties. (Pet. to Lift Stay, Ex. L.) Lennar filed a return in opposition to that motion on November 18, 2019. (Pet. to Lift Stay, Ex. M.) The Court of Appeals denied the Joint Motion by Order filed November 27, 2019. (Pet. to Lift Stay, Ex. N.) That Order contained no citation or legal analysis explaining the appellate court's decision.

Damico's Petition to Lift Stay as to Discovery and Subcontractor Claims is Damico's third attempt to circumvent the automatic stay imposed by an appeal per Rule 241, SCACR. At no time has Damico filed claims directly against Guaranteed. Damico's most recent petition relies on the ability to preserve judicial economy through allowing discovery and resolution of their claims against the subcontractor Defendants. Yet, Damico has no claims against Guaranteed. Accordingly, this Petition should be denied as to Guaranteed because Damico has no claims to be stayed against Guaranteed and this petition is consequently inappropriate as to Guaranteed.

ARGUMENT

Damico's Petition summarizes their arguments supporting the lift of the stay into five distinct points. Each of these arguments mention Lennar and its repeated attempts to prevent the lift of the stay. Three of Damico's five arguments recite Lennar's recent concession in oral arguments that it cannot force Plaintiffs to arbitrate its primary claims against subcontractor Defendants. The remaining two arguments contend Lennar's efforts to prevent the lifting of the stay have prohibited Damico from conducting discovery for, or even settling, its claims against subcontractor Defendants.

Damico's arguments lack merit as to Guaranteed because Damico has asserted no claims against Guaranteed, nor have they attempted to do so. Accordingly, the arguments made in

Damico's petition do not pertain to Guaranteed and are not properly before this Court to be decided as to Guaranteed. The arguments asserted in Damico's petition are novel as they relate to Guaranteed, due to no existing claims between the two parties, and must first be brought before the trial court. *See, Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000) (An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.) For this reason Damico's Petition should be denied as to Guaranteed.

Lennar's appeal stems from the trial court's denial of Lennar's motion to compel arbitration as to Damico, Defendants, and Third-Party Defendants, like Guaranteed. The trial court's denial was based upon the unconscionability or, alternatively, the ambiguity of the collective arbitration provisions. Accordingly, the issue on appeal is limited to whether the arbitration provisions are unconscionable or ambiguous and consequently unenforceable as to claims between Lennar and Damico, Defendants, or Third-Party Defendants, like Guaranteed.

Rule 241 of the South Carolina Rules of Appellate Procedure states a "notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to *automatically stay the relief ordered in the appealed order*, judgment, or decree or decision." SCACR 241 (emphasis added). The Court of Appeals examined this rule, though under a different code at the time, in *S.C. Nat. Bank v. Devine Blossom*, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996). In *S.C. Nat. Bank*, the appellate court examined a homeowner's attempt to file an Order of Appraisal two years after filing a notice of appeal from a master in equity as to the foreclosure of homeowner's property. The court held, "nothing in the master's order of foreclosure and deficiency addressed appellants' statutory right to an appraisal; therefore, appraisal of the subject property was not a matter decided in the order on appeal and

the automatic stay provisions...are inapplicable.” *Id.* at 113, 467 S.E.2d at 769. The court’s reasoning in that matter is analogous to the present circumstances. Nothing in the trial court’s order, or Lennar’s appeal, addressed Damico’s right to assert claims directly against Guaranteed; therefore, Damico’s ability to assert those claims is not a matter decided in the order on appeal and the automatic stay does not apply.

Petitioners have not filed direct claims against Guaranteed. Petitioners never sought to amend their complaint to assert direct claims against Guaranteed and therefore the Petition should be denied as to Guaranteed, because Petitioners have no pending claims against Guaranteed. In other words, there are currently no stayed claims asserted by Petitioners against Guaranteed for this Court to lift.

CONCLUSION

Because Petitioners have never asserted claims against Guaranteed, nor did Petitioners seek leave from the trial court to assert any claims against Guaranteed, there are no claims that have been stayed between Petitioners and Guaranteed for Petitioners to now seek to be lifted. Therefore, the issue of whether discovery should proceed or a stay should be lifted as to Petitioners and Guaranteed is not properly before the Court.

Respectfully submitted this 11th day of March, 2022,

/s/ Elizabeth Wieters

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