IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCY KULIC,
Appellant,
vs.
HUNTER'S RIDGE HOMEOWNER'S ASSOCIATION, A NEVADA CORPORATION AND BENCHMARK ASSOCIATION SERVICE,
Respondents.

No. 51610

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered on an arbitrator's decision in a real property action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

FACTS AND PROCEDURAL HISTORY

This case involves a dispute between appellant Marcy Kulic, a homeowner, and respondent Hunter's Ridge Homeowner's Association (the Association) concerning rust on Kulic's side gate. After mailing Kulic various notices, the Association began fining Kulic for failing to address the problem of the rust as it violated the Declaration of Covenants, Conditions and Restrictions (CC&Rs). Kulic eventually painted her gate but not before several months had passed and the fines had mounted. A collection agency for the Association sought to collect $1,456.19 and a lien was placed on Kulic's home.

Kulic filed a complaint against the Association that included a request for an injunction and claims of breach of fiduciary duties. Before an answer was filed, the parties submitted the case to nonbinding arbitration through the Nevada Department of Business and Industry, Real Estate Division (NRED). On September 30, 2007, the arbitrator

ruled in favor of the Association and ordered Kulic to pay all fines and costs imposed by the Association as well as the Association's attorney fees and costs.

In the order, the arbitrator informed the parties that "[p]ursuant to N.A.R. 18(A), you are hereby notified you have thirty (30) days from the date you are served with this document within which to file a written Request for Trial de Novo with the Clerk of the Court and serve the ADR Commissioner and all other parties." Kulic filed a request for trial de novo on October 10, 2007.

After Kulic filed her request for trial de novo, the ADR Commissioner of the Eighth Judicial District Court sent Kulic's attorney a letter informing Kulic that the arbitration rules (NAR (8)(A)) and trial de novo rules (NRS 38.255) did not apply to her case.[1] Nearly three months later, Kulic re-served her original complaint on the Association. By this time, the 30-day statutory period to commence a civil action following the decision and award by the arbitrator set forth in NRS 38.330 had passed.

The Association then filed a motion to dismiss for failure to comply with the applicable statutory requirements of NRS 38.300, et seq. The Association also filed a motion to confirm the arbitration award. The district court granted both motions, concluding that NRS 38.300 did apply and that Kulic's complaint was not timely filed following the arbitrator's decision.

---

[1]Kulic's complaint was controlled by NRS 38.300 through NRS 38.360, governing mediation and arbitration of claims relating to residential property within a common interest community.

Kulic argues: (1) the procedures set forth in NRS 38.310 and 38.330 do not apply to her claims; (2) given the arbitrator's instructions, the district court abused its discretion in enforcing the statutory time limits in spite of equitable considerations to the contrary; and (3) the district court erred in confirming the award of attorney fees and costs. For the reasons set forth below, we disagree and affirm the district court order.

DISCUSSION

At the outset, we note that the arbitrator was clearly wrong when he informed the parties that they had thirty days in which to file a request for trial de novo. In doing so, the arbitrator was referring to NRS 38.255 and NAR (8)(A), which govern arbitration of actions in district courts and justice courts. Kulic's complaint, however, was governed by NRS 38.300 through NRS 38.360, governing mediation and arbitration of claims relating to residential property within a common interest community, and had been arbitrated with NRED.

Application of NRS 38.310 and NRS 38.330

Kulic's complaint requires an interpretation of the CC&Rs

We conclude that Kulic's claims for breach of fiduciary duty and request for injunctive relief require an interpretation of the CC&Rs and thus, invoked the statutory requirements of NRS 38.310.

Kulic's complaint included causes of actions for injunctive relief and for breach of fiduciary duty. In her claim for breach of fiduciary duty, Kulic asserted that the Association acted in violation of its own CC&Rs by attempting to foreclose a lien by sale. Assessing whether the Association had acted in violation of its duties under the CC&Rs requires the interpretation of the CC&Rs' provisions. Resolving the merits of Kulic's complaint would require the district court to interpret the CC&Rs.

Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. ___, ___, 183 P.3d 895, 900 (2008).

Therefore, Kulic's claim falls within the purview of NRS 38.310(1) and the district court appropriately dismissed Kulic's complaint. Id. ("If a party institutes a civil action in violation of NRS 38.310(1), the district court must dismiss it pursuant to NRS 38.310(2).").

Kulic's complaint constitutes a civil action under NRS 38.310(1)

Kulic also argues that the claims in her complaint do not constitute a civil action under NRS 38.310(1). Kulic contends that her claims are both exceptions to the statutory requirements imposed by NRS 38.310. We disagree.

A "'[c]ivil action' includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property." NRS 38.300(3).

In Hamm, this court directly addressed this issue and concluded that "a lien, in and of itself, does not effect an immediate threat of irreparable harm." Id. at ___, 183 P.3d at 901. This court also held that "while a lien clouds title, it exists separately from that title, and therefore, an action simply to remove the lien does not 'relate to' residential title so as to fall outside the scope of NRS 38.310." Id. at ___, 183 P.3d at 901-02.

Accordingly, the statutory requirements of NRS 38.310 do apply to Kulic's complaint. Kulic's complaint, filed prior to arbitration, was properly dismissed pursuant to NRS 38.310(2) (requiring the court to dismiss any civil action relating to "[t]he interpretation, application or enforcement of any covenants, conditions or restrictions applicable to

residential property or any bylaws, rules or regulations adopted by an association").

The language of NRS 38.330(5) is mandatory

Kulic maintains that the language of NRS 38.330(5) is permissive and thus, she was not obligated to commence an action within 30 days of the arbitration decision. We disagree.

NRS 38.330(5) states that, following arbitration, "any party to the arbitration may, within 30 days after a decision and award . . . commence a civil action in the proper court concerning the claim which was submitted for arbitration." Kulic did not conform to the requirements clearly stated in NRS 38.330; she filed a request for trial de novo within 30 days, but she did not commence a civil action in the proper court within 30 days.

This court has repeatedly held that "when a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise." Village League v. State, Bd. of Equalization, 124 Nev. ___, ___, 194 P.3d 1254, 1259 (2008). Moreover, in determining whether the statutory language is mandatory, this court looks at the statutory scheme, policy, and equitable considerations. Id. This court has stated that NRS 38.310 was enacted because it "expresses Nevada's public policy favoring arbitration of disputes involving the interpretation and enforcement of CC&Rs." Hamm, 124 Nev. at ___, 183 P.3d at 902.

To interpret the word "may" in NRS 38.330(5) as permissive would clearly undermine the statutory scheme and the purpose of the statute. Because the plain language of the statute allows either party to commence a civil action within 30 days of the arbitrator's decision—and

Kulic failed to do so—the district court properly confirmed the arbitrator's decision.

Equitable considerations

Kulic argues that since she had proceeded with her claim by following the express instructions of the arbitrator, equitable remedies should apply to prevent her complaint from being barred. We disagree for two reasons.

First, the "principles of equity cannot be used to avoid a statutory mandate." Ghory v. Al-Lahham, 257 Cal. Rptr. 924, 926-27 (Ct. App. 1989) (rejecting the respondent's argument "that because the parties had agreed to the days and hours of employment, the equitable defense of unjust enrichment should preclude appellant's recovery of overtime compensation"). Kulic seeks equitable relief to overcome the requirement that is expressly mandated by NRS 38.330(5). We refuse to apply principles of equity to avoid a statutory mandate when Kulic had notice that her request for trial de novo was inadequate and failed take the necessary steps to rectify the problem in a timely manner.[2]

Second, we reject Kulic's assertion that this court should forgive her failure to satisfy the statutory requirements under the doctrine of unique circumstances because she relied on the arbitrator's erroneous instructions.

---

[2]We note that the ADR Commissioner informed Kulic of the potential deficiency on October 19, 2007. Kulic did not re-serve her complaint until January 15, 2008. Thus, Kulic took longer than 30 days to commence a civil action, even after she was notified about the problem.

"[U]nique circumstances exist only when 'a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.'" Seino v. Employers Ins. Co. of Nevada, 121 Nev. 146, 151, 111 P.3d 1107, 1111 (2005) (quoting Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989)). In Seino, this court refused to extend the doctrine of unique circumstances to Nevada administrative appeal periods or private insurance providers. Id. at 151-52, 111 P.3d at 1111-12.

Similarly, we refuse to extend the doctrine of unique circumstances to include instructions from a NRED arbitrator, as an arbitrator is not a judicial officer. See Black's Law Dictionary 1193 (9th ed. 2009) (defining the term judicial officer as "[a] judge or magistrate"). Therefore, the doctrine of unique circumstances is inapplicable to the instant facts.

Award of attorney fees and costs

Kulic argues that there was no authorization for an award of attorney fees and therefore, the award in favor of the Association was improper.

A district court can award attorney fees when authorized by statute, rule, or contract. Settelmeyer & Sons v. Smith & Harmer, 124 Nev. ___, ___, 197 P.3d 1051, 1060 (2008).

Here, the CC&Rs provide that "[i]f any court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the prevailing party shall be entitled to recover from the losing party any costs and expenses in connection therewith, including reasonable attorneys' fees." Because the CC&Rs

authorized an award for attorney fees to the prevailing party, the district court did not abuse its discretion in confirming the arbitrator's decision to award attorney fees and costs. Accordingly we,

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Susan Johnson, District Judge
William F. Buchanan, Settlement Judge
Sterling Law, LLC
Mario D. Valencia
Gibbs, Giden, Locher, Turner & Senet LLP
George B. Hibbeler
Eighth District Court Clerk