IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
D.R. HORTON, INC.,
Real Party in Interest.

No. 52798

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order granting partial summary judgment in a constructional defect action.

FACTS AND PROCEDURAL HISTORY

Petitioner High Noon At Arlington Ranch Homeowners Association (High Noon) manages a Las Vegas, Nevada, planned community that consists of 342 townhomes. High Noon brought suit against real party in interest D.R. Horton, Inc, the developer of the community. High Noon brought the suit "in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners Association unit owners." In the complaint, High Noon alleged various

constructional defects that affected both the common elements and the individual units located within the community.

D.R. Horton filed a motion for partial summary judgment in which it challenged High Noon's ability to pursue the constructional defect claims that concerned the individual units. D.R. Horton argued that High Noon, as a homeowners' association, lacked standing to bring suit for defects affecting individual units, asserting that an association's standing to commence an action under NRS 116.3102(1)(d) is limited to defects affecting the "common-interest community." D.R. Horton claimed that individual units were not part of the "common-interest community" with respect to which NRS 116.3102(1)(d) granted associations standing. In support of its interpretation of NRS 116.3102(1)(d), D.R. Horton argued that a contrary reading would permit homeowners' associations to bring representational actions without abiding by Nevada Rule of Civil Procedure 23's requirements governing class actions.

High Noon opposed the motion, maintaining that, under NRS 116.31088(3), D.R. Horton, as a nonmember developer, lacked standing to challenge an association's ability to raise claims on behalf of its members, and that NRS 116.3102(1)(d) expressly granted High Noon standing to bring suit for defects involving individual units, reasoning that the units are considered a part of the common-interest community.

The district court did not address Dorrell's argument regarding D.R. Horton's ability to challenge its standing, but agreed with D.R. Horton and concluded that High Noon, as a homeowners' association, lacked standing to bring a constructional defect suit on behalf of owners for defects affecting individual units. In its conclusions of law, the court explained that NRS 116.3102(10(d) is the sole provision granting

associations the power to bring suit on behalf of unit owners. NRS 116.3102(1)(d) grants associations power to "[i]nstitute . . . litigation . . . on behalf of itself or two or more units' owners on matters affecting the common-interest community." The court then construed NRS 116.021's definition of "common-interest community" and its use of the term "other than that unit" to evidence the Legislature's intent to limit the definition to exclude individual units. The court also concluded that because Arlington Ranch's CC&Rs provided that the claims affecting the units were the property of the individual unit owners, and that the CC&Rs did not confer any right or duty upon High Noon to "pursue defect claims related to the units," such right "remains with the individual homeowners and . . . can not be taken away." Accordingly, the court held that High Noon lacked standing to pursue such claims. As a result, High Noon filed a petition for extraordinary relief.

In its petition, High Noon asserts that the district court erred by considering D.R. Horton's challenge and that the district court misread NRS 116.3102(1)(d) because a plain reading of that statute demonstrates that a homeowners' association has standing to institute constructional defect litigation on behalf of owners for defects affecting individual units since the units are part of the common-interest community.

DISCUSSION

Propriety of writ relief

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion." We the People Nevada v. Secretary of State, 124 Nev. ___, ___, 192 P.3d 1166, 1170 (2008); see also NRS 34.160.

Having recently resolved these precise issues in D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), and concluded that: (1) a nonmember developer may challenge whether an association can properly assert claims in a representative capacity on behalf of its members; and (2) homeowners' associations have standing to institute litigation on behalf of it members for defects affecting individual units, subject to class action principles, we conclude that the district court abused its discretion by granting D.R. Horton's motion for partial summary judgment. As a result, we grant High Noon's petition.

A nonmember developer has standing to challenge whether a homeowners' association can properly assert claims in a representative capacity on behalf of its members

High Noon challenges the district court's consideration of D.R. Horton's motion for partial summary judgment, arguing that a developer lacks standing to challenge a homeowners' association's ability to raise claims on behalf of its members for defects affecting individual units under NRS 116.31088(3). As determined in D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), while we agree with High Noon that NRS 116.31088(3) prohibits a nonmember from challenging the adequacy of the procedure underlying the commencement of a civil action, we conclude that nothing in NRS 116.31088(3) prohibits a developer from challenging whether the homeowners' association meets the requirements for bringing a suit in its representative capacity.

NRS 116.31088 sets forth the statutorily required practices of a homeowners' association regarding civil actions. Included in the statute are the procedures and timing by which the association must notify each unit owner of the commencement of a civil action, and a provision that specifies that nonmembers cannot challenge the adequacy of the

procedures underlying the commencement of a civil action. As we concluded in D.R. Horton v. Dist. Ct., nothing in NRS 116.31088 precludes a developer from challenging the nature of the asserted claims and the damages sought against the developer in a constructional defect action; therefore, NRS 116.31088 is inapposite. 125 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 35, September 3, 2009). Accordingly, we conclude that the district court did not err by considering D.R. Horton's motion for partial summary judgment.

A homeowners' association has standing under NRS 116.3102(1)(d) to assert causes of action for constructional defects on behalf of its members

High Noon argues that the district court erred by concluding that High Noon does not have standing to assert constructional defect claims on behalf of its members for defects affecting individual units under NRS 116.3102(1)(d). In line with our holding in D.R. Horton, 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), we agree.

NRS Chapter 116, also known as the Uniform Common-Interest Ownership Act, NRS 116.001, applies to all common-interest, planned communities. NRS 116.1201. NRS 116.3102(1) provides, in pertinent part:

> Except as otherwise provided in subsection 2, and subject to the provisions of the declaration, the association may do any or all of the following:
>
> . . . .
>
> (d) Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

(Emphasis added.)

In D.R. Horton, because the meaning of "common-interest community," as used in NRS 116.3102(1), was ambiguous, we looked to the meaning of that term in light of other provisions of NRS Chapter 116, including "common-interest community," NRS 116.021, "unit," NRS 116.093, and "common elements," NRS 116.017, and concluded that units are part of the common-interest community. 125 Nev. at ___, ___ P.3d at ___. In coming to this conclusion, we analyzed the definition of a "common-interest community," under NRS 116.021—meaning, "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit"—and, contrary to D.R. Horton's argument, we concluded that the phrase "other than that unit" does not exclude a unit. D.R. Horton, 125 Nev. at ___, ___ P.3d at ___. Rather, NRS 116.021 merely expands the definition of "common-interest community" to require an owner to pay for realty other than that unit that he or she owns. Id. at ___, ___ P.3d at ___. Because we concluded that a unit is a part of the "common-interest community" as defined by NRS 116.021, we concluded that NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims "on matters affecting the common-interest community," including matters affecting individual units. Id. at ___, ___ P.3d at ___. We also noted that section 6.11 of the Restatement (Third) of Property and its comments support this court's interpretation of the term "common-interest community." D.R. Horton, 125 Nev. at ___, ___ P.3d at ___.

Applying this interpretation of NRS 116.3102(1)(d) to the facts of this case, we conclude that High Noon has standing to assert claims on behalf of its members for defects affecting individual units.[1]

We note, however, as we did in D.R. Horton, that although homeowners' associations have standing to bring constructional defect suits on behalf of individual unit owners for matters affecting individual units under NRS 116.3102(1)(d), that statute must be reconciled with the principles of class action lawsuits under NRCP 23 and the concerns related to constructional defect class actions, which this court examined in Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005). D.R. Horton, 125 Nev. at ___, ___ P.3d at ___.

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[1]NRS 116.3102(1) also requires this court to determine whether the community's declaration limit the homeowners' association's standing to assert constructional defect claims for defects that affect individual units. The Supplemental Declaration of Covenants, Conditions & Restrictions and Reservation of Easements (CC&Rs) at issue in this case provide that the "[d]uties, powers, and rights" of the association "includ[e] any applicable powers . . . as are expressly set forth in the Governing Documents, or in any applicable provision of NRS Chapter 116" and further defines "Community" as "a Common-Interest Community, as defined in [NRS Chapter 116]." Nothing in the CC&Rs prohibits High Noon from bringing constructional defect suits against third parties on behalf of individual owners. Therefore, because the CC&Rs grant High Noon the powers set forth in NRS Chapter 116 and define the "common-interest community" identically to Chapter 116, and they do not otherwise limit High Noon's standing, we determine that it is not necessary to separately address whether the CC&Rs exclude individual units from the community.

In Shuette, this court explained that because a fundamental tenet of property law is that land is unique, "as a practical matter, single-family residence constructional defect cases will rarely be appropriate for class action treatment." 121 Nev. at 854, 124 P.3d at 542. In other words, because constructional defect cases generally relate to multiple properties and often involve different types of damages, issues pertaining to causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof. Id. at 855, 124 P.3d at 543. Instead, individual parties must substantiate their own claims, which typically renders class action certification inappropriate. Id.

In sum, under the principles set forth in Shuette, if the claims asserted by a homeowners' association on behalf of its members involve multiple defects that disparately affect individual units and the developer objects to the association's action, the district court must analyze whether the association may, in a representative capacity, properly bring the action under NRCP 23. See Shuette, 121 Nev. at 856-57, 124 P.3d at 543-44. In doing so, the district court must consider "whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and, as in Shuette, whether 'common questions of law or fact predominate over individual questions,' or whether the action satisfies one of the other two options set forth in NRCP 23(b)."[2] D.R.

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[2]As noted in D.R. Horton, "in addition to considering whether common questions of law or fact predominate over claims concerning individual units, the district court, upon determining that the prerequisites enumerated in NRCP 23(a) are satisfied, could also consider whether the class action satisfies NRCP 23(b)(1) or (2)." 125 Nev. at ___ n.4, ___ P.3d at ___ n.4.

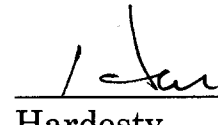
Horton, 125 Nev. at ___, ___ P.3d at ___ (quoting Shuette, 121 Nev. at 850, 124 P.3d at 539); see also NRCP 23. If necessary, the district court may grant conditional certification and reevaluate the action in light of any problems that arise during or after discovery. See Shuette, 121 Nev. at 857-58, 124 P.3d at 544.

Here, High Noon alleged several causes of action against D.R. Horton,[3] claiming, in part, that both the individual units and the common areas of the community have various defects and deficiencies pertaining to, for example, structure, electrical, plumbing, and roofing. Therefore, in accordance with the analysis set forth in D.R. Horton, we direct the district court to review the claims asserted by High Noon to determine whether the claims conform to class action principles, and thus, whether High Noon may file suit in a representative capacity for constructional

[3]In particular, High Noon alleged causes of action for breach of implied and express warranties, breach of contract, and breach of fiduciary duty.

defects affecting individual units. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to conduct further proceedings consistent with this order.

It is so ORDERED.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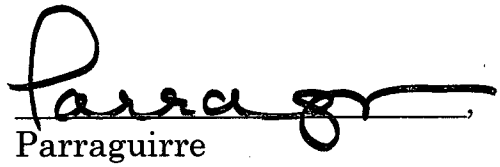
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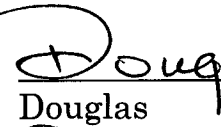
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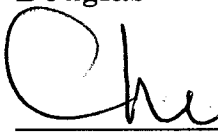
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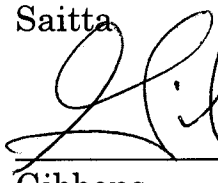
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Pickering

cc: Hon. Susan Johnson, District Judge
Quon Bruce Christensen Law Firm
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Eighth District Court Clerk