

IN THE SUPREME COURT OF THE STATE OF NEVADA

ENVIRONMENT FOR LIVING, INC.;
AND TIME FOR LIVING, INC.,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
TIMOTHY C. WILLIAMS, DISTRICT
JUDGE,

Respondents,

and

SERENITY HOMEOWNERS
ASSOCIATION,
Real Party in Interest.

No. 57515

FILED

JAN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus challenging a district court order granting a motion for declaratory relief regarding whether the case was appropriate for class action certification under NRCP 23.

Real party in interest Serenity Homeowners Association is a homeowners' association (HOA) created pursuant to NRS Chapter 116 that operates and manages the Serenity II project (the Project), a planned community. Serenity filed a complaint against the developer and general contractor, petitioners Environment for Living, Inc. and Time For Living, Inc. (collectively, Living), alleging: (1) breach of implied warranties; (2) breach of express warranties; and (3) negligence based on defective conditions on the real property, common areas, improvements, and appurtenances composing the Project. While this case was pending in

district court, this court issued its decision in D.R. Horton v. District Court, 125 Nev. 449, 215 P.3d 697 (2009) (First Light II), which held that HOAs have standing to assert constructional defect claims on behalf of individual unit owners pursuant to NRS 116.3102(1)(d) if they meet the class action certification requirements set out in NRCP 23.

Serenity filed a motion for declaratory relief requesting that the district court determine that its constructional defect claims against Living conformed to the requirements of NRCP 23. The district court granted Serenity's motion. Living now brings this petition for a writ of mandamus, arguing that the district court erred in determining that Serenity's claims satisfied the class action certification requirements of NRCP 23.

Standard of review

"A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion." State v. Dist. Ct., 116 Nev. 374, 379, 997 P.2d 126, 130 (2000). "Mandamus is an extraordinary remedy which 'will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'" Mineral County v. State, Dep't of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (citation omitted)). Mandamus is issued at the discretion of this court and is unavailable when a "petitioner has a plain, speedy, and adequate remedy in the ordinary course of law." Id. at 243, 20 P.3d at 805.

Here, the order being challenged is an order granting a motion for declaratory relief regarding whether the case was appropriate for class action certification; thus, it is not independently appealable. As Serenity

lacks a plain, speedy, and adequate remedy at law, we elect to exercise our discretion to consider its petition. Id.

In considering a writ petition, this court gives deference to a district court's factual determinations; however, we review questions of law de novo. Gonski v. Dist. Ct., 126 Nev. __, __, 245 P.3d 1164, 1168 (2010).

The district court failed to conduct a sufficient analysis in the determination of predominance

This court has held that an HOA has standing to institute a representative action on behalf of its individual members if the HOA's claims meet the NRCP 23 requirements as directed in Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 846-52, 124 P.3d 530, 537-41 (2005). First Light II, 125 Nev. at 458-59, 215 P.3d at 703-04. Pursuant to NRCP 23, a class action may be maintained only if all four of the NRCP 23(a) requirements (numerosity, commonality, typicality, and adequacy) and one of three additional NRCP 23(b) requirements is met.

"[F]ailure of a common-interest community association to strictly satisfy the NRCP 23 factors does not automatically result in a failure of the representative action." Beazer Homes Holding Corp. v. Dist. Ct., 128 Nev. __, __, __ P.3d __, __ (Adv. Op. No. 66, December 27, 2012). However, the district court must conduct and document an NRCP 23 analysis upon request. Id. Accordingly, even if an HOA has standing under NRS 116.3102(1)(d) to institute a representative action on behalf of two or more of its members, the HOA still must satisfy the requirements of NRCP 23 if it wishes to bring its representative action as a class-action suit. First Light II, 125 Nev. at 458, 215 P.3d at 703.

Here, the district court made its decision based on NRCP 23(b)(3), which requires a court to determine "that the questions of law or

fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” NRCP 23(b)(3). In order to conform with First Light II’s instruction to reconcile NRS 116.3102(1)(d) with the requirements of NRCP 23, Serenity’s claims must satisfy these predominance and superiority requirements in light of the principles and concerns discussed in Shuette. First Light II, 125 Nev. at 458-60, 215 P.3d at 703-04.

Under Shuette, the predominance inquiry

tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The questions of law or fact at issue in this analysis are those that qualify each class member’s case as a genuine controversy; therefore, the questions that class members have in common must be significant to the substantive legal analysis of the members’ claims.

While the NRCP 23(b)(3) predominance inquiry is related to the NRCP 23(a) commonality and typicality requirements, it is more demanding. The importance of common questions must predominate over the importance of questions peculiar to individual class members. For example, common questions predominate over individual questions if they significantly and directly impact each class member’s effort to establish liability and entitlement to relief, and their resolution can be achieved through generalized proof.

Shuette, 121 Nev. at 850-51, 124 P.3d at 540 (footnotes omitted) (internal quotations omitted).

The district court acknowledged Shuette’s holding, but found that in this matter, the NRS Chapter 40 notice was given as to the entire project, not individual units, and that Serenity’s claims were limited to the


building envelope, where a joint maintenance obligation existed. Thus, it concluded that the predominance requirement of NRCP 23(b)(3) was met.

It appears, however, that many of the factors that the Shuette court found to support its determination that the claims at issue failed to meet the NRCP 23(b)(3) predominance test are also present here. See Shuette, 121 Nev. at 858, 124 P.3d at 545 (finding that the claims brought by the individual homeowners “fail[ed] to satisfy the predominance prong of NRCP 23(b)(3) because the individual questions of cause and effect are more important than any common questions of exposure, and they cannot be resolved with generalized proof”). In this matter, there are 138 different residences involved, which comprise 14 different buildings. Additionally, these residences were constructed over a period of 5 years, under 2 different building codes, by over 50 subcontractors. See id. at 858-59, 124 P.3d at 545 (noting that the individual houses were constructed in different phases, under different plans, with different designs, and did not suffer from the same flaw). Not all of the residences have been inspected, and the variances in the defects in the inspected residences do not support extrapolating the findings to the residences that have not been inspected. See id. at 859, 124 P.3d at 545 (finding that separate litigation would be required because homeowner claims varied and not all of the properties had been inspected). Moreover, Living’s assertion of the defense of contributory negligence will further necessitate individualized proof. See id. at 860, 124 P.3d at 546.

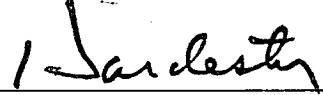
Even if this action only involves claims as to the building envelope where a joint maintenance obligation exists, there are still significant individual issues that will need to be resolved. Therefore, we

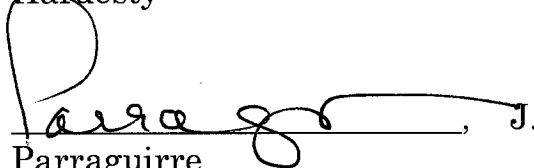
conclude that Serenity's claims fail to meet the NRCP 23(b)(3) predominance requirement. Accordingly, we

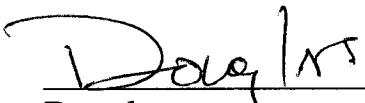
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to conduct further proceedings in light of this court's recent decision in Beazer Homes Holding Corp. v. District Court. We also vacate the stay of the underlying case in district court that was granted pending the consideration of this petition.

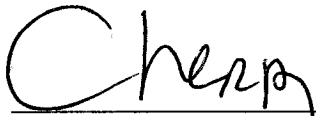

_____, C.J.
Pickering


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Timothy C. Williams, District Judge
Cooksey, Toolen, Gage, Duffy & Woog
Koeller Nebeker Carlson & Haluck, LLP/Las Vegas
Feinberg Grant Mayfield Kaneda & Litt, LLP
Eighth District Court Clerk