

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH
HOMEOWNERS ASSOCIATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
SUSAN H. JOHNSON, DISTRICT
JUDGE
Respondents,
and
D.R. HORTON, INC.,
Real Party in Interest.

No. 58630

FILED

JAN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of mandamus challenging a district court order refusing to permit a homeowners' association to assert certain construction defect claims on behalf of its members.

Petitioner High Noon at Arlington Ranch Homeowners Association is a homeowners' association (HOA) created pursuant to NRS Chapter 116 that operates and manages the High Noon at Arlington Ranch community, a planned community of 342 individually owned units. High Noon is also the assignee of the claims of 194 individual unit owners. High Noon filed a complaint against the developer, real party in interest D.R. Horton, alleging breach of implied and express warranties, breach of contract, and breach of fiduciary duty.

The instant petition arises from a district court order denying High Noon standing to proceed with a representative action on behalf of the 194 individual unit owners for which High Noon holds an assignment of claims and for claims based on the units' fire resistive and structural

components.¹ High Noon petitions this court for a writ of mandamus directing the district court to amend its order denying standing and to allow High Noon to proceed with its claims.

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.” Mineral County, 117 Nev. at 243, 20 P.3d at 805.

Here, the challenged order granted a motion for declaratory relief regarding whether the case was appropriate for class action certification; thus, it is not independently appealable. As High Noon lacks a plain, speedy, and adequate remedy at law, we elect to exercise our discretion to consider its petition. See id. In considering a writ petition, this court gives deference to a district court’s factual determinations;

¹The order granted High Noon standing to pursue claims based on the building envelopes. D.R. Horton filed a petition for a writ of mandamus or prohibition based on this determination. D.R. Horton, Inc. v. Dist. Ct. (High Noon at Arlington), Docket No. 58533.

however, we review questions of law de novo. Gonski v. Dist. Ct., 126 Nev. ___, ___, 245 P.3d 1164, 1168 (2010).

This court applies an abuse of discretion standard in its review of a class action certification decision. Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 846, 124 P.3d 530, 537 (2005). In determining whether to certify a class, a court should accept the allegations contained within a complaint as true. Meyer v. District Court, 110 Nev. 1357, 1363-64, 885 P.2d 622, 626 (1994). A court's class certification decision must be based on NRCP 23(a) and (b), which specify the circumstances under which a case is appropriate for resolution as a class action. Shuette, 121 Nev. at 846, 124 P.3d at 537.

The district court correctly concluded that High Noon lacked standing to assert constructional defect claims relating to individual units

This court has held that an HOA has standing to institute a representative action on behalf of its members if the HOA's claims meet the NRCP 23 requirements as directed in Shuette, 121 Nev. at 846-52, 124 P.3d at 537-41. D.R. Horton v. Dist. Ct., 125 Nev. 449, 458, 215 P.3d 697, 703 (2009) (First Light II). 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, a 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 conducted and documented a thorough NRCP 23 analysis and found that High Noon failed to meet the NRCP 23(a) commonality and typicality requirements and the NRCP 23(b)(3) predominance and superiority requirements.

Commonality

NRCP 23(a)'s commonality requirement provides that "members of a class may sue or be sued as representative parties on behalf of all only if . . . (2) there are questions of law or fact common to the class." NRCP 23(a). Following First Light II's instruction to reconcile NRS 116.3102(1)(d) with the requirements of NRCP 23, a court must consider whether the proposed representative's claims satisfy this commonality requirement in light of the principles and concerns discussed in Shuette. First Light II, 125 Nev. at 458-59, 215 P.3d at 703-04. Under Shuette, "[c]ommonality does not require that 'all questions of law and fact must be identical, but that an issue of law or fact exists that inheres in the complaints of all the class members.' Thus, this prerequisite may be satisfied by a single common question of law or fact." Shuette, 121 Nev. at 848, 124 P.3d at 538 (quoting Spera v. Fleming, Hovenkamp & Grayson, P.C., 4 S.W.3d 805, 811 (Tex. App. 1999)).

Here, the district court found that High Noon failed to meet the commonality requirement because

it has not adequately demonstrated an issue of law or fact exists that inheres in the complaints of all the 194 units' owners. Instead [High Noon] identifies a myriad of vague complaints in Paragraph 16 of the Complaint, which include, but are not limited to structural, fire safety, waterproofing defects, and deficiencies in the civil engineering/landscaping, roofing, stucco and

drainage, architectural, mechanical, plumbing, HVAC, acoustical, electrical, and those relating to the operation of windows and sliding doors.

This is a reasonable interpretation of First Light II's instruction to reconcile NRS 116.3102(1)(d) with NRCP 23 and the principles and concerns discussed in Shuette. Accordingly, we conclude that the district court did not err in finding that High Noon's claims did not meet NRCP 23(a)'s commonality requirement.

Typicality

NRCP 23(a)'s typicality requirement provides that "members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class." NRCP 23(a). Under Shuette,

[t]he typicality prerequisite can be satisfied, then, by showing that each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. Thus, the representatives' claims need not be identical, and class action certification will not be prevented by mere factual variations among class members' underlying individual claims. For instance, typicality of claims can result when each owner in a condominium complex suffer[s] damage by way of being assessed for repairs to leaky common area roofs, even though some of the individual unit owners have not otherwise suffered from leakage problems.

Shuette, 121 Nev. at 848-49, 124 P.3d at 538-39 (alteration in original) (footnotes omitted) (internal quotations omitted).

Here, the district court found that NRCP 23(a)'s typicality prerequisite was not met because "given the myriad of constructional defects alleged, it is also difficult to perceive whether they are typical of those found within the 194 assigned-claims' homes. Even [High Noon] has

admitted it has not visually inspected or destructively tested all 342, or even the 194 'assigned' units within the development." The court further noted that High Noon had not sustained its burden to show that the damage suffered by each of the 194 unit owners was the same and that the use of limited extrapolation data was unfair to both D.R. Horton and any unit owner who suffered additional or different harm. This is a reasonable interpretation of First Light II's instruction to reconcile NRS 116.3102(1)(d) with NRCP 23 and the principles and concerns discussed in Shuette. Accordingly, we conclude that the district court did not err in finding that High Noon's claims did not meet NRCP 23(a)'s typicality requirement.

Predominance

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).

Here, the district court noted Shuette's instruction that NRCP 23(b)(3)'s predominance requirement is more demanding than the NRCP 23(a) commonality and typicality requirements. Therefore, the court found that because High Noon failed to satisfy NRCP 23(a)'s commonality and typicality requirements, High Noon also failed to satisfy the more demanding predominance prong of NRCP 23(a). This is a reasonable interpretation of First Light II's instruction to reconcile NRS 116.3102(1)(d) with NRCP 23 and the principles and concerns discussed in Shuette. Accordingly, we conclude that the district court did not err in finding that High Noon's claims did not meet NRCP 23(b)(3)'s predominance requirement.

Superiority

Under Shuette, the superiority inquiry questions whether class action is the superior method for adjudicating the claims, thereby promoting the interests of efficiency, consistency, and ensuring that class members actually obtain relief. A proper class action prevents identical issues from being litigated over and over[,] thus avoid[ing] duplicative proceedings and inconsistent results. It also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion.

Shuette, 121 Nev. at 851-52, 124 P.3d at 540-41 (alterations in original) (footnotes omitted) (internal quotations omitted).

When conducting this inquiry, a court should take into account individual interests in controlling the litigation, the status of any other litigation of the matter by class members, the desirability of the particular forum, whether the class action will be manageable, the time and effort a district court must expend, and whether other adjudication methods would allow for efficient resolution without compromising any

parties' claims or defenses. Id. at 852, 124 P.3d at 541. Additionally, a court should take into account the parties' ability to comply with the requirements of NRS Chapter 40, including the claimants' responsibility to give notice, the contractor's obligation to respond, both parties' continuing responsibilities of disclosure to prospective purchasers, and the claimants' opportunity to recover damages such as attorney fees. Id. at 853, 124 P.3d at 541-42.

Here, the district court found that High Noon failed to meet its burden of showing that a class action is the superior method of adjudication. It noted that High Noon had not demonstrated "that class certification would promote the interests of efficiency, consistency, and ensuring that class members actually obtain relief." (Internal quotations omitted). The court further noted that High Noon's inability to obtain assignments from the other 148 units' owners was an indication that additional litigation may occur if it were to certify the class, and the fact that damages are recoverable under NRS 40.655 weighed against finding that the 194 unit owners who did assign their claims would be unable or unwilling to litigate their claims individually. This is a reasonable interpretation of D.R. Horton's instruction to reconcile NRS 116.3102(1)(d) with NRCP 23 and the principles and concerns discussed in Shuette; therefore, we conclude that the district court did not err in finding that High Noon's claims did not meet NRCP 23(b)(3)'s superiority requirement.

The district court did not err in its findings that High Noon failed to meet the commonality, typicality, predominance, and superiority requirements of NRCP 23. We therefore conclude that the district court

did not err in denying standing to High Noon to sue for defects in individual units.² Accordingly, we

ORDER the petition DENIED.³

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

²High Noon also argues that it has standing to pursue all constructional defect claims relating to each of the 194 units for which it obtained an assignment of claims from its owner that is independent from the standing granted to it by NRS Chapter 116. However, we agree with the district court that the fact that High Noon obtained the right to bring claims on behalf of unit-owners by assignment instead of through NRS 116.3102(1)(d) did not eliminate High Noon's duty to fulfill the requirements of NRCP 23 as set forth in D.R. Horton v. District Court, 125 Nev. 449, 215 P.3d 697 (2009) (First Light II).

³The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in this matter.

cc: Hon. Susan Johnson, District Judge
Angius & Terry LLP/Las Vegas
Koeller Nebeker Carlson & Haluck, LLP/Las Vegas
Wood, Smith, Henning & Berman, LLP
Eighth District Court Clerk