IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
PREM DEFERRED TRUST; ELSINORE, LLC; MONTESA, LLC; KING FUTTS PFM, LLC; AND HIGHER GROUND, LLC, ON BEHALF OF THEMSELVES AND AS REPRESENTATIVES OF THE CLASS HEREIN DEFINED,
Real Parties in Interest.

No. 72357

FILED

JUL 11 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING IN PART PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus or, alternatively, prohibition challenges the district court's denial of petitioner Southern Highlands Community Association's motion to dismiss and its certification of a class.

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 an arbitrary or capricious exercise of discretion.[1] *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial*

[1]Because mandamus, rather than prohibition, constitutes the proper vehicle to challenge the ruling at issue here, we deny Southern Highlands' alternative request for a writ of prohibition. *See* NRS 34.320 (defining a writ of prohibition).

Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to entertain a writ petition is within this court's discretion and we generally will not consider writ petitions challenging district court orders denying motions to dismiss, unless no factual dispute exists and the district court was obligated to dismiss the action pursuant to clear authority or an important issue of law needs clarification. *See Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59. And petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Having considered the briefing and documents submitted to this court as part of the petition, we conclude that writ relief is warranted.

In the action below, Southern Highlands sought to dismiss real parties in interest's (collectively, PREM) second amended complaint because the dispute at issue there involved the interpretation of the relevant covenants, conditions, and restrictions (CC&Rs) and thus had to be submitted to the Nevada Real Estate Division (NRED) for arbitration or mediation first under NRS 38.310 (providing that any action involving the "interpretation, application or enforcement of any" CC&Rs must be submitted to mediation or arbitration before a civil complaint can be filed, otherwise it must be dismissed). *See So. Highlands Cmty. Ass'n v. Eighth Judicial Dist. Court*, Docket Nos. 61940 & 62587 (Order Granting in Part and Denying in Part Petitions for Writs of Mandamus or Prohibition, November 10, 2014). The district court denied the motion and Southern Highlands then filed an original petition for a writ of mandamus with the supreme court challenging that decision. *See id.* The supreme court granted the writ in part and directed the district court to dismiss the claims challenging "the validity or amount of an association's lien" that had not been submitted to arbitration or mediation because their

resolution "necessarily involve[d] resort to or interpretation of the association's CC&Rs."[2] *Id.* at 10; *see also* NRS 38.310.

Following the supreme court's order, PREM sought leave to file a third amended complaint on behalf of itself and other similarly situated parties, which the district court allowed over Southern Highlands' opposition. The district court also certified the proposed class as requested by PREM. Southern Highlands then sought to dismiss the complaint on the same basis identified in the supreme court's order: because resolution of the claims would involve the interpretation, application, or enforcement of the CC&Rs and therefore they must first be submitted to arbitration pursuant to NRS 38.310. The district court denied the motion to dismiss, and Southern Highlands then filed the instant writ petition.

In its petition, Southern Highlands asserts that PREM's third amended complaint contains essentially the same claims as the ones the supreme court ordered the district court to dismiss, such that the third amended complaint must also be dismissed. PREM responds that the supreme court specifically stated in its prior order that if a complaint only challenged the "tabulation" of the lien, then resort to the CC&Rs would not be necessary and NRS 38.310 would not be triggered. *So. Highlands*, at 10 n.6. And PREM asserts that, because its third amended complaint only challenges the tabulation of the liens at issue therein, its claims are not subject to NRS 38.310's arbitration requirement.

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[2]To that end, PREM had submitted its claims to NRED arbitration but, upon filing its complaint, it purported to also bring the action on behalf of other similarly situated parties. Thus, while PREM's claims could survive because they had already been arbitrated pursuant to NRS 38.310, the parties whose claims had not been submitted to arbitration were directed to be dismissed.

PREM's third amended complaint does specifically state that it is not challenging the amount or validity of Southern Highlands' liens. But when comparing the two complaints and the allegations contained therein, it is clear that both complaints are, in fact, challenging the validity and amount of the lien and that PREM has merely made superficial language changes to try and avoid being subject to the prior supreme court decision. In the first complaint, the claims the supreme court ordered dismissed included allegations that Southern Highlands falsely represented the amount of the lien and improperly collected and retained the false lien amounts. *See id.* at 11. And in the third amended complaint at issue here, PREM alleged that Southern Highlands "knowingly demanded, collected and retained . . . erroneously tabulated amounts." The only real difference between these allegations is that, in its third amended complaint, PREM swapped the phrase "erroneously tabulated amounts" for the previously used "unlawful lien amounts" terminology throughout its complaint while continuing to seek largely the same relief as was requested in the second amended complaint.

We recognize that, in its prior order, the supreme court included a footnote stating that "[i]f no challenge is brought to the association's budget or assessments or the validity or amount of its lien, then tabulating the statutorily mandated superpriority amount, or determining the statutory effect of the various lien priorities subsequent to foreclosure, would generally not involve interpreting the CC&Rs." *So. Highlands*, at 10 n.6. But the supreme court's order makes clear that this "tabulation" exception only applies if there is no challenge to the validity or amount of the lien, as such challenges necessarily involve resorting to or interpretation of the CC&Rs and thus must first be submitted to NRED for mediation or arbitration in line with NRS 38.310. *Id.* Although the supreme court did not explain what might constitute an appropriate

tabulation claim, we need not reach that issue, as there is nothing in the supreme court's prior decision to suggest that a party can avoid being subject to NRS 38.310's arbitration requirement by making semantic language changes to claims like the ones at issue here that clearly challenge the amounts of the subject liens.

Thus, in line with the supreme court's earlier decision, it follows that, because resolution of the third amended complaint would involve resorting to or the interpretation of the CC&Rs, those claims must be dismissed if they were not first submitted to NRED for mediation or arbitration.[3] *See* NRS 38.310; *see also Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (providing that "when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case").

Accordingly, we grant in part Southern Highlands' petition. We direct the clerk of this court to issue a writ of mandamus that instructs the district court to (1) vacate its order denying Southern Highlands' motion to dismiss the claims in the third amended complaint; (2) determine who among the parties submitted their claims to an arbitrator or mediator under NRS 38.310; and (3) dismiss the claims identified

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[3]Indeed, in *Southern Highlands* the supreme court stated:

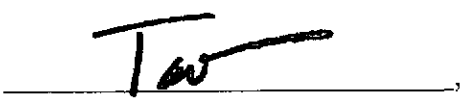
> [T]he causes of action in the second amended complaint involve the interpretation of Southern Highlands' CC&Rs. Such claims are within NRS 38.310's arbitration or mediation requirement. Thus, inasmuch as these claims were brought on behalf of parties who did not submit them to an arbitrator or mediator . . . NRS 38.310 precludes the district court's consideration of these claims . . . and these claims must be dismissed."

Id. at 12.

herein that are brought by parties who have not submitted their claims to arbitration under NRS 38.310, without prejudice to the ability of those parties to submit their claims to arbitration before bringing the claim again or to file an amended complaint that does not challenge the validity or amount of Southern Highlands' liens.[4]

It is so ORDERED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Peterson Baker, PLLC
Adams Law Group
Eighth District Court Clerk

[4]We also vacate the district court's order granting class certification without prejudice to PREM's ability to again move for class certification in light of our decision's likely impact on the potential class.