

Cemantic Changed Do Not Allow Class Action Claims To Circumvent Need Jurisdiction

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Southern Highlands Community Assoc. v. Eighth Judicial Dist. Court of Nevada, et al, No. 72357, 2017 WL 3013057 (NV App, July 11, 2017 (unpublished)).

In a recent unpublished opinion, the Nevada Court of Appeals reversed a district court's denial of a homeowner association's motion to dismiss a class action complaint. The court of appeals affirmed that claims involving the interpretation of an HOA's covenants, conditions, and restrictions (CC&Rs) must be submitted to the Nevada Real Estate Division's (NRED) alternative dispute resolution program before a district court has jurisdiction. In addition, a court should look to the substance of a complaint to determine whether it involves interpreting CC&Rs and not blindly accept a plaintiff's assertion in its complaint that its

claims do not involve interpreting CC&Rs.

Background

Prem Deferred Trust and four other plaintiffs (hereafter referred to as the "plaintiffs") in the case are entities that purchased real property in the Southern Highlands Community at bank foreclosure sales and then quickly sold the properties for a profit. After the plaintiffs purchased the properties, the Southern Highlands Community Association ("Southern Highlands") sought to collect from the plaintiffs past due assessments, along with interest, fees, and other charges that had accrued on the properties due to the previous owners' failure to pay. Under Nevada law, HOAs may place a lien on property within their communities for unpaid assessment fees and various other HOA charges. Pursuant to NRS 116.3116(2), a portion of an HOA's lien (which includes the equivalent of nine months of regular assessments) is superior to a lender's first deed of trust, known as the super-priority amount.

The plaintiffs paid Southern Highlands the amounts the HOA asserted it was owed, then the plaintiffs sold those properties. Years later, the plaintiffs are now attempting to recoup the amounts they claim they overpaid Southern Highlands on the premise that the super-priority

amount cannot include late fees, interests, or other charges, just the equivalent of nine months of regular assessments. The plaintiffs claim Southern Highlands violated its CC&Rs as well as NRS 116.3116(2) by charging them more than nine months of assessments.

The five plaintiffs filed a complaint with NRED's alternative dispute resolution division (hereafter referred to as "NRED ADR") on behalf of themselves "and others similarly situated" to arbitrate the claims. Nevada law provides that when a claim involves the interpretation, application, or enforcement of an HOA's CC&Rs, the claim must be submitted to NRED ADR before a lawsuit may be filed in district court. *See* NRS 38.310. However, the NRED ADR arbitrator refused to hear any claims other than the named plaintiffs' themselves. After the arbitrator ruled in favor of Southern Highlands, the plaintiffs lodged a complaint in district court as a class action and asserted various causes of action regarding the alleged over payments. The plaintiffs eventually filed an amended complaint.

In response to the first amended complaint, Southern Highlands filed a motion to dismiss "the class allegations and all claims that were not individually submitted to NRED for arbitration or mediation." The district court agreed with

Southern Highlands that since some of the plaintiffs' claims directly involved the CC&Rs and the proposed class members had not first submitted their claims to NRED, those particular claims should be dismissed. In addition, the district court granted the plaintiffs leave to file a second amended complaint, which they did, omitting any reference to the CC&Rs. However, Southern Highlands again filed a motion to dismiss all the class allegations, arguing that despite not explicitly referencing the CC&Rs, the plaintiffs' claims still involved interpreting the CC&Rs. The district court denied Southern Highlands' motion to dismiss.

The first writ of mandamus to the Nevada Supreme Court

After the district court's denial of its second motion to dismiss, Southern Highlands filed a writ of mandamus¹ with the Nevada Supreme Court, requesting the Court to order the district court to dismiss all of the plaintiffs' claims in its amended complaint. On November 10, 2014, the Court issued its opinion.² The Court determined that some, but not all, of the claims should be dismissed. Referencing NRS 38.310, the Court reiterated, "if an action involves ascertaining the meaning of the language in the CC&Rs or 'bylaws, rules or regulations,' the action is within

the scope of NRS 38.310's mediation and arbitration requirement." If such claims have not been arbitrated or mediated by NRED before being filed in district court, "[a] court shall dismiss any civil action which is commenced in violation of the provisions" of NRS 38.310.

In reaching its holding, the Nevada Supreme Court explained "the CC&Rs may establish which assessments and charges an association is authorized to impose and which imposed assessments and charges form the basis of the lien. As a result, where parties dispute the validity of the charges imposed or the lien's amount under NRS 116.3116(1), those questions cannot be resolved without referencing the CC&Rs, the declaration, or other governing documents." However, "if the party does not dispute the validity or amount of an association's lien or the monthly assessment derived from the association's periodic budget, then no resort to the CC&Rs is necessary and the matter may proceed in the district court."

Interestingly, in footnote 6 of the opinion, the Court stated: "If 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 a foreclosure, would generally not involve interpreting the CC&Rs." Regardless, the Court then ruled five out of six of the plaintiffs' claims involved the interpretation of Southern Highlands' CC&Rs, so those five claims that were brought on behalf of parties (i.e., proposed class members) who did not first submit them to NRED ADR must be dismissed.

The plaintiffs argued they did submit those five class claims to NRED ADR as a class action, but the arbitrator refused to hear claims on behalf of unnamed class members; therefore, the plaintiffs' duty under NRS 38.310 was fulfilled. However, the Court rejected this argument, stating the term "submit" means "[t]o end the presentation of further evidence in (a case) and tender a legal position for decision." *See Black's Law Dictionary* 1466 (8th ed. 2004). This involves more than simply filing a claim, it involves actually putting on evidence and legal argument. All the plaintiffs did here was file a class action complaint with NRED ADR, but the arbitrator refused to rule on any party's claims that were not named parties. Therefore, class member claims were not "submitted" to NRED ADR.

In footnote 8, the majority addressed the dissent's opinion

¹ A writ of mandamus is a petition that compels a person holding an office (such as a judge) to take action that the law requires based on his office. *See* NRS 34.160 ("The writ may be issued by the Supreme Court, the Court of Appeals, a

district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station...").

² *See S. Highlands Cmty. Ass'n v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, No. 61940, 2014 WL 5840129* (Order Granting in Part and Denying in Part Petitions for Writs of Mandamus or Prohibition, November 10, 2014).

regarding the efficiency or practicality of requiring each potential class member having to submit its claim to NRED ADR before filing a lawsuit in district court. The majority stated that while it might be a “meritorious policy” to allow class action claims to go forward in NRED ADR, “such a holding would require a deviation from NRS 38.310’s plain meaning” that all claims must first be submitted to NRED ADR.

The second writ of mandamus to the Nevada Court of Appeals

After the Nevada Supreme Court’s 2014 decision, the district court granted the plaintiffs’ request to file a third amended complaint in which it again asserted class claims. The district court then certified the proposed class, creating a class action lawsuit. Thereafter, Southern Highlands filed another motion to dismiss the plaintiff’s class action complaint, arguing the third amended complaint “contains essentially the same claims as the ones the [Nevada] supreme court ordered the district court to dismiss.” However, the district court denied the motion to dismiss and Southern Highlands filed another writ of mandamus. This time the writ was sent to the Nevada Court of Appeals (hereafter referred to as the “appellate court”) for a decision.

The plaintiffs argued their third amended complaint did not involve the interpretation,

application, or enforcement of the CC&Rs. The document even explicitly states the plaintiffs are not challenging the amount or validity of Southern Highlands’ liens or the CC&Rs. Accordingly, the plaintiffs did not need to follow NRS 38.310 and submit their claims to NRED ADR first. The plaintiffs attempted to base their third amended complaint around footnote 6 of the 2014 decision, arguing they were only challenging the “tabulation” of Southern Highlands’ lien and nothing to do with the CC&Rs.

The appellate court rejected the plaintiffs’ argument, holding: “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 [the plaintiffs] ha[ve] merely made superficial language changes to try and avoid being subject to the prior supreme court decision.” The appellate court found the plaintiffs only made superficial changes to the language of the complaint while keeping the substance the same. For example, the appellate court noted the plaintiffs “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.”

The appellate court addressed the plaintiffs’ footnote 6 “tabulation” argument, stating that although the Nevada Supreme Court did not explain what an appropriate

tabulation claim might look like, and the plaintiffs assert theirs is a 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.”

The appellate court then granted Southern Highlands’ petition in part and ordered the district court to vacate its grant of class certification and denial of Southern Highlands’ motion to dismiss. The appellate court ordered the district court to determine which class members submitted their claims to NRED and then dismiss the claims of those class members that had not done so. However, the appellate court ordered the claims dismissed “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.”

Significance

The *Southern Highlands* opinion is an example of how Nevada appellate courts focus on the substance of pleadings over form. Although the plaintiffs in this case modified the language in the third amended complaint to say something different on its face, in substance the third amended

complaint had not changed. “A party can[not] avoid being subject to NRS 38.310's arbitration requirement by making semantic language changes to claims.”

Although the *Southern Highlands* decision may be considered an “unpublished” decision, it will likely carry great significance for those excessive lien cases where class certification has already been granted or where the plaintiffs are seeking class certification. Most of the excessive lien cases involve nearly identical complaints that were amended. As a result, if defendant HOAs move to decertify class action cases based on the reasoning in *Southern Highlands* and a district court denies the motion, the HOAs should be able to simply file a petition for writ of mandamus. The writ would likely be heard by the same court that issued the *Southern Highlands* opinion, and the HOAs would likely obtain the same favorable result from the appellate court.

Then again, the plaintiffs in *Southern Highlands* are likely to appeal to the Nevada Supreme Court. Thus, if the Nevada Supreme Court agrees to hear the case, it may be several years before the Nevada Supreme Court issues its decision. In the interim, the district courts that have similar class action cases currently before them will likely follow the *Southern Highlands* decision or stay the cases until the Nevada Supreme Court hands down a decision.

Lastly, one important area that the *Southern Highlands* decision did not address is the statute of limitations on the plaintiffs' claims. By ordering the claims dismissed “without prejudice,” the appellate court left open the possibility that the plaintiffs could submit their claims to NRED ADR and then file a fourth amended complaint with the district court. However, many of the class members' claims are over 9 years old, well past the statute of limitations.

Consequently, Southern Highlands may argue the statute of limitations precludes the plaintiffs from submitting their claims to NRED ADR or filing a fourth amended complaint with the district court. On the other hand, the plaintiffs may argue the statute of limitations was tolled by the appellate court's order, the doctrine of equitable tolling, or some other Nevada savings statute. However, this is a whole other topic for another article at another time.

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