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## D.R. Horton, Inc. v. Eighth Jud. Dist. Ct, 131 Nev., Adv. Op. 86 (October 29, 2015)

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## CIVIL PROCEDURE: CONSTRUCTION DEFECT CONTEXT

### Summary

The Nevada Supreme Court considered a Petitioner home builder's petition for writ relief and appeal of a district court order granting Respondent HOA's ex parte motion for a stay and enlargement of time for service pursuant to NRS 40.647(2)(b). Ruling on Petitioner's two writ petitions, the Court held the district court's grant of a stay was not in error and the NRCP 41(e) five-year limitation period was tolled under the *Boren*<sup>2</sup> exception to NRCP 41(e). Accordingly, the Court denied both writ petitions.

### Background

High Noon at Arlington Ranch Homeowners Association operates Arlington Ranch community, which consists of 342 individual units contained in 114 buildings. The sales documents for these units preclude express and implied warranty actions after two years. On July 7, 2007, High Noon filed a complaint against homebuilder, D.R. Horton, alleging breach of implied and express warranties, breach of contract, and breach of fiduciary duties. While High Noon did not specifically allege its claims fell within NRS 40's construction defect provisions, High Noon moved for an ex parte stay and enlargement of time for service pending completion of construction defect pre litigation procedures pursuant to NRS 40.647(2)(b). Conversely, D.R. Horton moved for dismissal pursuant to NRCP 41(e)'s five-year rule. The district court denied the motion to dismiss and granted a stay, which commenced on April 13, 2007. Over eight years later, NRS Chapter 40 process remains incomplete. D.R. Horton appeals and requests writ relief.

### Discussion

*Writ relief is appropriate*

While writ relief is generally not available when "adequate and speedy legal remedies exist,"<sup>3</sup> the Nevada Supreme Court may exercise discretion to intervene to clarify issues of law and promote judicial economy and administration.<sup>4</sup> This case calls the Court to address two important issues in Nevada construction defect law, namely, whether NRS 40.647(2) allows a stay of proceedings for a party to comply with NRS Chapter 40 construction defect prelitigation duties, and whether the stay tolls the running of the five year period under NRCP 41(e). Accordingly, as a threshold issue, writ relief is appropriate here.

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<sup>1</sup> By Brandonn Grossman

<sup>2</sup> *Boren v. City of North Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982).

<sup>3</sup> *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

<sup>4</sup> *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (quoting *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)).

*Granting stay pursuant to NRCPC 40.647(2)*

NRS 40.647(2)(b) specifically states that a plaintiff who files a constructional defect suit before completing pre litigation process would be prevented from filing another suit “because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with [NRS Chapter 40 requirements].”<sup>5</sup>

Because NRS Chapter 40 does not prevent any defense otherwise available<sup>6</sup> and D.R. Horton attempted to limit its warranties in their sales documents to a two-year period pursuant to NRS 116.4116(1), D.R. Horton could argue a shorter limitations period based on these sales contracts. Based on contractual modification of the NRS Chapter 116 limitation period for warranties, the Court broadly interpreted NRS 40.647(2)(b) to allow the district court to enter stay, analogous to its authority in a statute of limitations context, so High Noon could undertake NRS Chapter 40 pre litigation process without jeopardizing its claim. Accordingly, the Court affirmed the district court’s grant of a stay and enlargement of time.

*The August 2007 stay tolled the five-year rule under the Boren exception*

While NRCPC 41(e)’s five-year rule requires dismissal of an action where a case has not been brought to trial after five years,<sup>7</sup> the Nevada Supreme Court has recognized exceptions to the mandatory nature of this required dismissal. The *Boren* exception reads “any period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of [NRCPC] 41(e).”<sup>8</sup> The Court determined the *Boren* rule applied here, where the matter was stayed until completion of NRS 40.600 litigation process and the August 2007 stay effectively tolls the NRCPC 41(e) period while stay is in effect.

*The future of Boren*

The Court declined to interpret *Boren* and its progeny as requiring district courts to evaluate the diligence of parties in determining if a valid court-ordered stay tolls the NRCPC 41(e) period. A proper stay, such as the one here, tolls this prescriptive period as long as the stay remains in effect, notwithstanding diligence of the parties. The Court importantly noted such stays prevent parties from prosecuting the case. Additionally, the Court refused to adopt a new exemption to the *Boren* rule excluding constructional defect stays from tolling. The Court determined stays by way of NRS 40.647(2)(b) in the construction defect context are given the full period allowed by NRCPC 41(e). Accordingly, NRS Chapter 40 litigants are included in the *Boren* exception.

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<sup>5</sup> NEV. REV. STAT. § 40.647 (2)(b).

<sup>6</sup> NEV. REV. STAT. § 40.635(3).

<sup>7</sup> NEV. R. CIV. P. 41(e).

<sup>8</sup> *Boren*, 638 P.2d at 405.

## **Conclusion**

The Court denied both writs, holding the August 2007 stay is valid, which tolled the five-year prescriptive period under NRCP 41(e), pursuant to *Boren*.