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Summary of In re CityCenter Construction & Lien Master Litigation, 129 Nev. Adv. Op. 70

Michael Paretti
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Summary

The Court determined two issues: (1) whether the district court was correct in holding that an amended pleading must be dismissed because it was not filed with an affidavit and expert report required under Nevada law; (2) and whether the entire case must be dismissed or just the amended complaint must be dismissed under the meaning of “action.”

Disposition

When a party is engaged in the practice of professional engineering and fails to submit an attorney affidavit and expert reports pursuant to Nevada Law², the Court must dismiss the pleading, not the entire action.

Factual and Procedural History

Century, and its successor in interest, PCS, are subcontractors responsible for the steel installation of the Harmon Tower. Harmon Tower is a building in the large-scale, mixed-use development in Las Vegas commonly referred to as “CityCenter.” Harmon Tower’s project owner hired Converse to render quality control and insurance inspections. Converse’s services included inspecting Century and PCS’s work for quality assurance and ensuring the project was compliant with the construction plans.

Construction on Harmon Tower stopped because of ongoing litigation addressing alleged defects in the project. Century and PCS filed third-party and fourth-party complaints against Converse for “contribution and/or indemnity allegedly warranted by Converse’s negligent inspection work.”

The district court dismissed Century and PCS’s claims and granted the parties leave to file amended complaints against Converse alleging “negligent and intentional misrepresentation, contribution, and equitable indemnity.” When Century and PCS filed both the initial and amended complaints against Converse, they did not file an affidavit or an expert report regarding the basis for their claims. Converse moved to dismiss the pleadings pursuant to NRS 11.259³, “arguing that Century and PCS failed to file the attorney affidavit and expert report with their initial complaints, as required by NRS 11.258⁴ for actions against design professionals involving nonresidential construction.” The district court summarily denied Converse’s motion. Accordingly, Converse filed for a writ of mandamus.

¹ By Michael Paretti.

² NEV. REV. STAT. 11.258 (2013).

³ NEV. REV. STAT. 11.259(1) (2013).

⁴ NEV. REV. STAT. 11.258 (2013).

Discussion

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion."⁵ Converse argues that the law requires the Court to dismiss Century and PCS's amended pleadings as a result of their failure to file the attorney and expert report at the time the complaints were served. Converse's writ petition is warranted because this issue is not fact-bound and involves unsettled issues of law likely to recur.⁶

The amended pleadings must be dismissed

For actions involving nonresidential construction, complainant's attorneys must file an affidavit and expert report attesting to a reasonable basis for the action when the first pleading is served. Converse asserts Century and PCS did not provide such documents with their first pleading, and accordingly, the pleadings against Converse must be dismissed.

Century's and PCS's initial pleadings involved the construction of a nonresidential building

Because the definition of an action involving nonresidential construction is "expansive, the claims do not have to be directly based on the design, construction, or manufacture of a nonresidential building, but merely 'involve' those activities."⁷ "Construction of a building involves inspection of the ongoing construction activity, and claims that a quality control and assurance inspector made misrepresentations about the construction's quality or was at fault for defective conditions concern the construction of the building."

Converse is a design professional

A design professional is defined as someone who holds "a professional license or certificate issued pursuant to Nevada law⁸, or a person primarily engaged in the practice of professional engineering, land surveying, architecture or landscape architecture."⁹ In determining whether Converse is a design professional, the Court accepts Century and PCS's allegations as true. Because Century and PCS alleged "that Converse was required to inspect the steel work for irregularities and deficiencies and make certain that the installation of the steel comported with construction plans and specifications" Converse is recognized as a design professional.

⁵ *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); see NEV. REV. STAT. 34.160 (2013).

⁶ See NEV. REV. STAT. 34.330 (2013) (providing that a writ of mandamus is available only when no adequate legal remedy exists); *Buckwalter v. Eighth Jud. Dist. Ct.*, 126 Nev. ___, 234 P.3d 920, 921 (2010) (recognizing that we may consider a petition for writ relief contesting the denial of a motion to dismiss when "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law").

⁷ NEV. REV. STAT. 11.2565 (2013).

⁸ See NEV. REV. STAT. 623, 623A, 625 (2013).

⁹ NEV. REV. STAT. 11.2565(2)(b) (2013).

NRS 11.259(1) and the dismissal of Century's and PCS's amended pleadings

The meaning of the term “action” reveals an ambiguity because it could be read in different ways. Converse argues that action means the entire case must be dismissed. Century and PCS argue that “action” only refers to the pleadings in question. Numerous provisions of Nevada Law use the verb filing with the term action.¹⁰ “In this instance, considering the way in which the Legislature uses the term ‘action’ in conjunction with other relevant statutes reveals that the term is used synonymously with ‘pleading.’” Moreover, in an attempt to avoid absurd results and consistent with statutory interpretation, the Court asserts, “when litigation includes several parties' pleadings, it is unreasonable to dismiss all the parties' pleadings because two parties filed void complaints.”

Conclusion

The Nevada Supreme Court granted Converse's petition for a writ of mandamus to compel the dismissal of the amended pleadings because “Century and PCS's initial pleadings against Converse were void ab initio and of no legal effect for the lack of the attorney affidavit and expert report.” However, the Court instructed the district court to only dismiss Century and PCS's initial pleadings, not the entire case.

¹⁰ See NEV. REV. STAT. 11.258(2), (4) (2013).