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Summary of State, Bus. & Indus. v. Nev. Ass'n Servs., 128 Nev. Adv. Op. No. 34

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Miscellaneous – Homeowners' Association Fee Regulations

Summary

The Court considered, on appeal, whether the district court erred in granting a preliminary injunction and prohibiting the State of Nevada Department of Business and Industry, Financial Institutions Division (hereinafter referred to as the “Department”) from enforcing its declaratory order and advisory opinion regarding the appropriate amount of homeowners' association lien fees Nevada Association Services (hereinafter referred to as “NAS”) can collect.

Disposition/Outcome

The Court found that the district court did not abuse its discretion in issuing the injunction because the Department did not have jurisdiction to issue an advisory opinion regarding NRS Chapter 116. Furthermore, the Court found that NAS would suffer irreparable harm if the Department enforced its opinion. Thus, the Court affirmed the district court's order granting NAS's request for injunctive relief.

Factual and Procedural History

The Department is responsible for regulating the collection practices of collection agencies in the state of Nevada, in accordance with NRS Chapter 649. Consistent with this responsibility, the Department has the authority to issue advisory opinions “as to the applicability of any such statutory provision.”² A homeowners' association (hereinafter referred to as “HOA”), which may act on behalf of a common-interest community, will often employ collection agencies to assist with collecting assessments owed by homeowners within the community. The statutes governing common-interest communities and common-interest ownership are contained in NRS Chapter 116.

In November 2010, the Department issued an advisory opinion in which it interpreted certain statutes within NRS Chapter 116. The Department believed that HOAs had not sufficiently fixed the amount of additional fees, charges, interest, costs, penalties or fines, which an HOA may charge. To remedy this, the Department concluded that a collection agency is limited to the total of nine months of assessments for common charges on the amount it can collect pursuant to priority status provided in NRS 116.3116(2). This nine-month cap includes any additional fees, charges, interest, costs, penalties or fines that the association could apply towards a lien pursuant to NRS 116.3116. Additionally, the Department concluded that prior to the imposition of any additional fees, charges, penalty and interest to any assessment or fine by a

¹ By Jason DeForest

² NEV. REV. STAT. § 233B.120 (2007).

collection agency, the association must expressly approve the fees, charges, penalty and interest pursuant to the provisions in its governing documents.

Concerned that the Department would enforce its advisory opinion, NAS filed a complaint and motion for preliminary injunction in district court. Primarily, NAS argued that the Department lacked jurisdiction to issue advisory opinions interpreting NRS Chapter 116. The district court granted NAS's request for a preliminary injunction, finding that neither NRS Chapter 649 nor NRS Chapter 116 authorized the Department to interpret the provisions of NRS Chapter 116. Conversely, the district court found that the Real Estate Division of the Department of Business and Industry and the Commission for Common Interest Communities and Condominium Hotels (hereinafter referred to as the "CCICCH") have exclusive jurisdiction to interpret and administer the provisions of NRS Chapter 116. Having determined that the Department lacked jurisdiction to issue the advisory opinion, the district court granted NAS's request for preliminary injunction.

Discussion

The Department's primary contention on appeal was that NAS failed to show that it had a likelihood of success on the merits because the Department had jurisdiction to issue an advisory opinion regarding NRS Chapter 116. To determine whether the Department had such jurisdiction, the Court reviewed several sections from NRS Chapters 649 and 116.

First, under NRS 649.051, the commissioner of the Department is granted authority to administer and enforce the provisions of NRS Chapter 649 and may adopt "such regulations as may be necessary to carry out the provisions of this chapter."³ Consistent with this authority, the commissioner may determine prohibited collection agency practices. For instance, collection agencies may not "[c]ollect or attempt to collect any interest, charge, fee or expense incidental to the principal obligation unless . . . such [sums] a[re] authorized by law or [have been] agreed to by the parties."⁴ If such violations occur, the Departments may impose fines, or suspend or revoke the license of a collection agency.⁵

Second, Article 3 of NRS Chapter 116 contains several provisions for the management of common-interest communities. Specifically, NRS 116.3102(1) provides that "[t]he [CCICCH] shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section."⁶ Further, NRS 116.615(1)-(3) provides that the CCICCH and the Real Estate Division are responsible for regulating and administering the chapter. Finally, NRS Chapter 116 addresses the issuance of advisory opinions, stating that "[t]he [Real Estate] Division shall provide by regulation for the filing and prompt disposition of petitions for

³ NEV. REV. STAT. § 649.053 (2007).

⁴ NEV. REV. STAT. § 649.375(2)(a)-(b) (2007).

⁵ NEV. REV. STAT. § 649.395(1)-(3) (2007).

⁶ NEV. REV. STAT. § 116.3102(1) (2007).

declaratory orders and advisory opinions as to the applicability or interpretation of: (a) [a]ny provision of this chapter or chapter 116A or 116B of NRS.”⁷

Based on a plain, harmonized reading of these statutes, the Court declared that the responsibility of determining which fees may be charged, the maximum amount of such fees, and whether they maintain a priority, rests with the Real Estate Division and the CCICCH. Thus, the Court found that the Department lacked jurisdiction to issue an advisory opinion interpreting NRS Chapter 116.

Finally, the Court determined that the filing of a disciplinary action against NAS would cause irreparable harm. In the instant case, the district court explained that, pursuant to NRS 649.395(2)(a), the Department could revoke NAS’s license without a hearing. Although NAS would have an opportunity to contest the finding within 20 days, it would be unable to conduct business during that time, which would cause irreparable harm to NAS. The Court adopted the findings of the district court and determined that extending jurisdiction to the Department would cause irreparable harm to NAS.

Conclusion

Because the responsibility of determining HOA fees rests with the Real Estate Division and the CCICCH, the Department lacked jurisdiction to issue an advisory opinion interpreting NRS Chapter 116. Thus, NAS demonstrated a reasonable likelihood of success on the merits. Further, if the Department were to file a disciplinary action, NAS would lose business while awaiting a hearing on the action. Thus, the district court was justified in finding that NAS would suffer irreparable harm if the Court lifted the injunction. Based on the foregoing, the Court determined that the district court did not err in granting the injunction.

⁷ NEV. REV. STAT. § 116.623(1)(a) (2007).