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Summary of Hamm v. Arrowcreek Homeowner's Ass'n, 124 Nev. Adv. Op. No. 28

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Recommended Citation

Haze, Airene, "Summary of Hamm v. Arrowcreek Homeowner's Ass'n, 124 Nev. Adv. Op. No. 28" (2008).
Nevada Supreme Court Summaries. 435.
<https://scholars.law.unlv.edu/nvscs/435>

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PROPERTY LAW- HOMEOWNER'S ASSOCIATION LIEN

SUMMARY

Appeal from a district court order dismissing homeowner's action that sought to release a homeowner's association lien. Under NRS 383.10, the district court must dismiss any dispute arising from the interpretation, application, or enforcement of homeowner's associations' covenants, conditions, and restrictions (CC&R) if the parties did not first submit to mediation or arbitration. This statute, however, does not apply to actions for injunctive relief involving "immediate threat of irreparable harm, or action[s] relating to the title to residential property."²

DISPOSITION/OUTCOME

The Nevada Supreme Court held that filing of lien, in and of itself, does not create an "immediate or irreparable harm"³ and that action to release lien without more does not "relat[e] to the title of residential property."⁴ Accordingly, the Nevada Supreme Court affirmed the district court holding that homeowners were required to submit their claims to an arbitration or mediation before instituting an action to the district court to release a lien.

The Nevada Supreme Court also held that if the collection agency acts as the agent for the homeowners' association and NRS 38.310 applies to the action against the homeowner's association, then the statute applies equally to the collection agency.

Finally, the Nevada Supreme Court concluded that NRS 38.310 does not violate the constitutional rights to a jury trial and equal protection under the law.

FACTUAL AND PROCEDURAL HISTORY

In 2004, the appellants Michael and Cara Hamm purchased a home and an adjoining vacant lot in the Arrowcreek subdivision, a planned community in Reno, Nevada. According to Mr. and Mrs. Hamm, they were told that they would not be required to pay assessment fees on the vacant lot pursuant to Arrowcreek's CC&R when they purchased the properties.

However, respondent Arrowcreek Homeowners Association (Arrowcreek HOA) sent them a notice assessing late fees and interest when the Mr. and Mrs. Hamm failed to pay the assessment fee on the vacant lot. Subsequently, Nevada Association Services (NAS), a collection agency, notified the appellants that they were required to pay Arrowcreek HOA the amount due within ten days to prevent the recording of a notice of delinquent assessment lien. Although Mr. and Mrs. Hamm immediately notified NAS that the assessment was disputed, NAS, at the direction of HOA, filed a notice of delinquent assessment lien with the county recorder.

The appellants filed a district court complaint against Arrowcreek HOA and NSA. The Hamms alleged, *inter alia*, that Arrowcreek's actions clouded title to their properties and harmed their creditworthiness.

¹ By Airene Haze

² NEV. REV. STAT. § 38.300(3) (amended effective January 1, 2008)

³ *Id.*

⁴ *Id.*

Arrowcreek HOA moved to dismiss the complaint under NRCP 12(b)(5), based on the Hamm's failure to state a claim upon which relief could be granted and for their failure to comply with NRS 38.310. Under NRS 38.310, parties must submit claims relating to the interpretation and application of CC&R to mediation or arbitration before seeking relief in the district court. Alternatively, Arrowcreek HOA moved to compel mediation or arbitration pursuant to NRS 38.310.

The district court concluded that the Hamm's complaint called for interpretation and enforcement of CC&R and, consequently dismissed the complaint. In its order, the district court stated that once arbitration was concluded, the Hamms could seek relief from the lien in the district court. The Hamms appealed.

DISCUSSION

NRS 38.310(1), provides that “[n]o civil action based upon a claim relating to . . . [t]he interpretation, application or enforcement” of CC&Rs may be commenced in state court, “unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive.”⁵

The Hamms argued that the provision does not apply to their action to release lien because (1) they sought not to interpret the CC&R, but merely to enforce prior interpretation of those CC&Rs; (2) for their action is not a “civil action” under NRS 38.310; and (3) the lien portion of their claims that was directed at NAS, which is not a homeowner's association, was not subject to NRS 38.310.

The Hamms further contended that NRS 38.310 is unconstitutional because (1) it infringes on right to jury trial by requiring mediation or arbitration and (2) it violates equal protection because homeowner' association may record a lien without submitting to mediation or arbitration, but homeowners must submit to mediation or arbitration before initiating an action in the district court to have the lien removed.

NRS 38.310s application to action seeking “interpretation, application or enforcement of CC&Rs

Although the Hamms argued that they did not seek CC&R's interpretation, the Hamms' complaint explicitly stated that the Hamms sought “court intervention to interpret the language . . . of the Arrowcreek [HOA] CC&R's.” Additionally, resolving the merits of the Hamm's complaint would require the district court to interpret the CC&Rs' meaning to determine whether Arrowcreek HOA's assessment was proper. Accordingly, so long as the Hamm's action constitutes a “civil action” for NRS 38.310 purposes, and NRS 38.310 applies to NAS, the Hamms must submit their claims to arbitration or mediation before instituting an action in the district court.

Definition of “civil action” for purposes of NRS 38.310

For NRS 38.310 purposes, a “civil action” *does not include* an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.”⁶

Based on these exceptions, the Hamms contend that their action seeking to remove the lien, was not a “civil action” under NRS Chapter 38 because the lien created an “immediate threat of irreparable

⁵ See NEV. REV. STAT. § 116.4117(2) (requiring parties to comply with NRS 38.310 before suing for damages on claims arising from a failure or refusal to comply with homeowner's association documents.)

⁶ NEV. REV. STAT. § 38.300(3) (emphasis added)

harm” by clouding their titled and putting Arrowcreek in the position to foreclose on their property. They also contend that the matter was not a “civil action” because it was related to a residential title.

Exception to the definition of “civil action”: “immediate threat of irreparable harm”

“[A] lien is a security device that binds property to a debt and puts a party on notice that someone besides the owner of the property has an interest in that property.”⁷ This court has noted that a lien on property clouds that property title.⁸ However, whether the mere existence of a lien creates an immediate threat or irreparable harm depends on the meanings of “immediate” and “irreparable”

Although the Nevada Supreme Court has concluded that *foreclosure* may result in irreparable harm,⁹ a lien is merely a preliminary step to foreclosure and does not itself instantly implicate the loss of unique real property.

The Commonwealth of Pennsylvania recognized that, “[i]n special circumstances, a court conceivably could find that a property owner would be irreparably harmed because of the existence of [a] lien.”¹⁰ However, the Pennsylvania court concluded that the property owners must allege and prove an irreparable harm “apart from the existence of the liens themselves”¹¹ because liens usually may be removed by paying money or posting security. The Nevada Supreme Court found this reasoning persuasive and concluded that filing a lien, in and of itself, does not pose an immediate threat or irreparable harm.

Here, the Hamms did not allege or prove irreparable harm. Instead, they merely asserted that the lien clouded their title and harmed their perceived “creditworthiness”. Additionally, Arrowcreek HOA had not yet instituted a foreclosure proceeding. Hence, the district court did not err in concluding that Hamm’s action fell within the scope of NRS 38.310.

Exception to definition of “civil action”: “an action relating to the title to residential property”¹²

The Nevada Supreme Court also clarified that while a lien clouds a title, it exists separately from that title, and therefore, an action simply to remove the lien does not “relate to” residential title so as to fall outside the scope of NRS 38.310.

While a lien creates a security interest in a property, “[a] lien right alone does not give the lien holder right and title to property.”¹³ Instead the title¹⁴ remains with the property owner until the lien is enforced through foreclosure proceedings. Before that time, a lien merely gives its holder priority to the

⁷ State, Dep’t Human Res. v. Estate of Ullmer, 120 Nev. 108, 117, 87 P.3d 1045, 1051 (2004).

⁸ See In re Contrevo, 123 Nev. 20, 24, 153 P.3d 652, 655 (2007); O’Dell v. Martin, 101 Nev. 142, 143, 696 P.2d 996, 997 (1985) (explaining that federal tax liens recorded against the appellant’s property clouded title to that property.

⁹ Dixon v. Thatcher, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (holding that foreclosure poses irreparable harm “[b]ecause real property and its attributes are considered unique.”)

¹⁰ LCN Real Estate v. Borough of Wyoming, 544 A.2d 1053, 1059 (Pa. Commw. Ct. 1988).

¹¹ *Id.*

¹² The Nevada Supreme Court has not previously addressed whether an action to release a lien constitute an “action relating to the title to residential property.”

¹³ In re Marino, 205 B.R. 897, 899 (Bankr. N.D. Ill. 1997).

¹⁴ See BLACK’S LAW DICTIONARY 1522 (8th ed. 2004). A title “constitut[es] the legal right to control and dispose of property.”

property and security for compensation.¹⁵ Therefore, an action to remove the liens does not, in and of itself, “relate to” the owner’s title so as to come outside the definition of “civil action” for NRS 38.310 purposes.

Here, Arrowcreek recorded a lien against the Hamms’ property, but it did not initiate proceedings to foreclose upon the lien. The filing of the lien created a monetary encumbrance that did not alter the Hamms’ title to property. Accordingly, the Nevada Supreme Court concluded that Hamms’ action to release lien did not “relat[e] to the title to residential property.”¹⁶

Additionally, the Nevada Supreme Court also concluded that NRS 38.310 expresses Nevada’s public policy favoring arbitration of disputes involving interpretation of enforcement of CC&R.

Application of NRS 38.310 to an action against a collection agency working as an agent for a homeowner’s association

The Hamms argued that NRS 38.310 does not apply to their claim against NAS because NAS is a collection agency, not an “association.” NAS argued that it was Arrowcreek HOA’s agent and therefore also subject to NRS 38.310.

An agency relationship is created when one person possesses the contractual right to control another’s manner of performing the duties for which he or she was hired.¹⁷ The Nevada Supreme Court concluded that an agency relationship existed here because Arrowcreek HOA hired NAS to collect the Hamms’ alleged assessments and possessed the contractual right to direct NAS to record the lien on behalf of Arrowcreek HOA. Therefore, NRS 38.310 applies to the Hamms’ claims against NAS just as it applies to their claims against Arrowcreek HOA.

Constitutionality of NRS 38.310

The Hamms also argue that NRS 38.310 violates their constitutional rights to a jury trial and equal protection under the law.

NRS 38.310 and the constitutional right to a jury trial

Under Article 1, Section 3 of the Nevada Constitution, “[t]he right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law” Here, NRS 38.310 does not require binding arbitration. It merely requires that the parties submit to mediation, nonbinding arbitration, or binding arbitration before they initiate a civil action.¹⁸ If the parties agree to nonbinding arbitration, “any party to the arbitration may, within 30 days after a decision and award have been served upon the parties, commence a civil action in the proper court concerning the claim which was submitted for arbitration.”¹⁹ Even if the parties agree to binding arbitration, the arbitration award may be vacated and a rehearing granted pursuant to NRS 38.241.²⁰

¹⁵ In re Marino, 205 B.R. at 899.

¹⁶ NEV. REV. STAT. § 38.300(3)

¹⁷ Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992); *see also* Mills v. Haggard, 58 S.W.3d 164, 165 (Tex. App. 2001) (holding that collection agencies that attempts to collect on a promissory note secured by a lien “acts[] as agents for the various holders of the note.”)

¹⁸ NEV. REV. STAT. § 38.310(1)

¹⁹ NEV. REV. STAT. § 38.330(5)

²⁰ NEV. REV. STAT. § 38.330(6)

Here, the Nevada Supreme Court concluded that NRS 38.310 did not violate Hamms' constitutional right. The Hamms and Arrowcreek could select mediation or arbitration pursuant to the provisions of NRS 38.330. Additionally, Hamms had adequate legal remedies available to them upon the conclusion of either nonbinding or binding arbitration.

NRS 38.310 and the constitutional right to equal protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees equal protection under the law. If fundamental rights are not infringed or a suspect class is not involved, the statute will survive an equal protection attack so long as [it] is rationally related to a legitimate governmental purpose.”²¹ Here, no fundamental rights are involved, and the Nevada Supreme Court applied the rational basis test to assess the constitutionality of NRS 38.310.

NRS 116.3116(1) provides that liens exist when assessments are due, regardless of any classification. Thus, an association is not required to commence a civil action to record or perfect the lien, which already exists once assessments are due, and, therefore, such association need not submit to mediation or arbitration before recording the lien. The Court concluded that NRS 38.310 does not treat similarly situated individuals differently because it requires mediation or arbitration before civil actions are initiated by homeowners or homeowners' associations alike, without classification.

Applying the rational basis test, the Court concluded that NRS 38.310's requirement of mediation or arbitration is rationally related to the legitimate governmental interest of assisting homeowners to achieve a quicker and less costly resolution of their disputes with homeowners' associations. Therefore, NRS 38.310 does not violate equal protection principles

CONCLUSION

The Nevada Supreme Court affirmed the district court's dismissal of Hamms' action against Arrowcreek HOA because they had not submitted to mediation or arbitration pursuant to NRS 38.310.

²¹ Arata v. Faubion, 123 Nev. ___, ___, 161 P.3d 244, 248 (2007).