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Summary of *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. Adv. Op. 82

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Shuette v. Beazer Homes Holding Corp., 121 Nev. Adv. Op. 82 (2005)¹

CONSTRUCTION DEFECT—CLASS ACTION CERTIFICATION, ATTORNEY FEES, AND PREJUDGEMENT INTEREST

Summary

Beazer Homes constructed and sold 206 single-family residences between 1994 and 1999 on a 40-acre residential subdivision. In April 2000, three homeowners, individually, and as proposed class representatives, filed a complaint against Beazer Homes alleging constructional defects to their homes. The complaint alleged that their houses' foundations and concrete slabs were damaged by expansive soils, a condition in which the soils beneath a house expand when exposed to water and contract when the soil dries. This condition can cause a house's foundation and concreted slab to crack and separate. The plaintiffs also alleged over 30 additional constructional defects unrelated to the soils condition.

Four months after the complaint was filed the first district court judge granted class certification without conducting a NRCP 23 analysis. Following considerable discovery, Beazer Homes sought decertification of the homeowners' class action. Beazer Homes argued that certification was granted with respect to the common question of expansive soils, however, subsequent discovery demonstrated that a number of houses were not impacted by expansive soils and that individualized proof for the cause of expansive soils was required because of grading, landscaping, changes to drainage, lot slopes, grade preparation and retaining walls. The district court judge denied decertification.

During trial, Beazer renewed its motion to decertify. Again, the district court judge denied the motion with no NRCP 23 analysis. A jury returned a verdict for the homeowners in the sum of \$7,885,500. Thereafter, the homeowners sought attorney fees pursuant to NRS 40.655. Beazer Homes objected claiming that the subject of attorney's fees should have been presented to the jury. The district court awarded attorney fees and prejudgment interest.

The Supreme Court agreed with Beazer Homes and held that class action certification was inappropriate under NRCP 23. NRCP 23(a) and (b) specify the circumstances under which a case is appropriately designated and maintained as a class action. Under NRCP 23(a), plaintiffs seeking class action certification must satisfy four prerequisites: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy.² In addition

¹ Commentary by Joshua Benson

² *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. Adv. Op. 82 (2005) (“‘Numerosity’ prerequisite requires that the members of the proposed class be so numerous that separate joinder is impracticable... ‘Commonality’ prerequisite necessitates the existence of questions of law or fact common to each member of the class... ‘Typicality’ prerequisite class for a showing that the representative parties’ claims or defenses are typical of the class’s claims or defenses... ‘Adequacy’ prerequisite mandates that the representative parties be able to fairly and adequately protect and represent each class member’s interests”).

to meeting NRCP 23(a), plaintiffs must meet one of the three conditions set forth in NRCP 23(b): (1) that separate litigation by individuals in the class would create a risk that the opposing party would be held to inconsistent standards of conduct or that nonparty members interests might be unfairly impacted by the other members' individual litigation; (2) that the party opposing the class has acted or refused to act against the class in a manner making appropriate classwide injunctive or declaratory relief; or (3) that common questions of law or fact predominate over individual questions , and a class action is superior to other methods of adjudication. Here, the homeowners advanced their class action based upon the third condition of NRCP 23(b)

The district court abused its discretion by not conducting a thorough NRCP 23 analysis. First, individualized proof of the cause and defenses to the expansive soils claims was necessary. Second, the district court allowed other claims to be adjudicated even though the class action certification only applied to the expansive soils issue. And third, the court failed to conduct a thorough NRCP 23 analysis even when it became apparent that class action certification was problematic. A thorough NRCP 23 analysis would have demonstrated that class action was inappropriate.

Additionally, the Nevada Supreme Court held that claimants may recover attorney fees as an item of damages under NRS 40.655(1)(a). "Thus, any time that a case is tried by legal counsel and a jury determines that the claimant is entitled to recover damages proximately caused by a constructional defect, a court can presume that the claimant is entitled to the recovery of attorney fees, whether or not the jury verdict explicitly so states."³ The method for determining the fees to be awarded is at the discretion of the court which is tempered by reason and fairness. However, the court must use the factors enumerated in *Brunzel v. Golden Gate National Bank*:⁴ the advocate's professional qualities, the nature of the litigation, the work performed, and the result.

Finally, the Supreme Court held that prejudgment interest was properly awarded on the entire verdict because the award represented only past damages. Prejudgment interest may not be awarded on an entire verdict where it is impossible to determine what part of the verdict represents past damages and what part represents future damages. Here, all the damages were past damages "because the damages occurred when the homes were built, regardless of when the homeowners actually made or will make necessary repairs."⁵

Issue and Disposition

Issue

Is class action certification appropriate in constructional defect cases involving single-family residences?

³ *Id.* at 33-34 (citing *Murphey v. Stowe Club Highlands*, 761 A.2d 688, 699-702 (Vt. 2000)).

⁴ *Brunzell v. Golden Gate National Bank*, 85 Nev. 345 (1969).

⁵ *Shuette*, 121 Nev. Adv. Op. 82 (2005).

Disposition

Generally no. Single-family residence constructional defect litigation often raises diverse, individualized claims and defenses, which results in the requirements for class action certification not being met. However, class action may be appropriate “if the construction defect case or issue involves a singular defect that predominates over any other problems, which remain minimal.”⁶

Commentary

State of law before *Shuette v. Beazer Homes Holding Corp.*

Before *Shuette v. Beazer Homes Holding Corp.* the law in this area was governed by NRCP 23. However, class action applicability in construction defect cases was unclear.

Effect of *Shuette v. Beazer Homes Holding Corp.* on Current Law

The Nevada Supreme Court disagreed with the district court and held that class action certification was inappropriate in this construction defect case. It held that the district court abused its discretion when it failed to conduct and document a thorough NRCP 23 analysis.

Even with a NRCP 23 analysis, the Nevada Supreme Court essentially ruled that construction defect cases are rarely adequate for class action certification. Where specific parcels of land are concerned, the unique characteristics of the land weigh heavily in favor of requiring independent litigation to determine the liability of each parcel and its owner. Additionally, when the uniqueness of land is not implicated, constructional defect cases relating to several properties are often very complex and involve different levels or types of property damages. These cases often present issues of causation, liability defenses, and damages that cannot be determined in class actions, but require each party to individually substantiate their claims.

There are few construction defect cases that may survive a thorough NRCP 23 analysis, but the district court needs to go through that analysis to determine if a class action suit is appropriate.

Other Jurisdictions

The court’s conclusion that construction defect litigation is generally not appropriate for class action certification is consistent with the law of other jurisdictions. The California Supreme Court has held that class actions involving real property “are

⁶ *Id.* at 24 (*see Hicks v. Kaufman & Broad Home Corp.*, 107 Cal Rptr.2d 761 (Ct. App. 2001) (class action was permissible because the alleged defect consisted of the improper use of a certain material used in each house’s concrete slab).

often incompatible with the fundamental maxim that each parcel of land is unique”.⁷ A federal district court in North Carolina held recognized that any recovery in class action cases often “implicate[s] myriad of ‘house specific’ issues.”⁸ For these reasons, courts in other jurisdictions rarely certify class actions.⁹

Conclusion

The Supreme Court of Nevada established that class action certification in construction defect cases is rarely appropriate. In the few cases that it is appropriate, the district court must conduct a thorough NRCP 23 analysis. Additionally, the Court held that attorney’s fees are damages to be determined by the judge and prejudgment interest is properly awarded where the damage has already occurred even though the specific claims for the damages have not been submitted.

⁷ *City of San Jose v. Superior Ct.*, 525 P.2d 701, 711 (Cal. 1974).

⁸ *In re Stucco Litigation*, 175 F.R.D. 210, 215 (E.D.N.C. 1997) (analyzing a request to certify a nationwide class of homeowners).

⁹ *See Hicks v. Kaufman & Broad Home Corp.*, 107 Cal Rptr.2d 761 (Ct. App. 2001); *see also Simeon v. Colley Homes Inc.*, 818 So. 2d 125 (La. Ct. App. 2001) (concluding that predominate individual issues of causation are not amenable to class action certification); *see also Basurco v. 21st Century Ins. Co.*, 133 Cal. Rptr. 2d 367, 373 (Ct. App. 2003) (affirming the denial of class action status in cases involving earthquake damages because the existence, cause, and extent of property damages and any recovery would necessarily have to be determined “on a case-by case basis”); *see also Brown v. New Orleans Service Inc.*, 506 So. 2d 621 (La. Ct. App. 1987) (reversing class action certification in a utilities power interruption case because rights of plaintiffs were not of sufficient common character with rights of members of proposed class of ratepayers to warrant class certification).