

IN THE SUPREME COURT OF NEVADA

SATICOY BAY, LLC SERIES 9720
HITCHING RAIL, A NEVADA
LIMITED LIABILITY COMPANY,

Appellant,

v.

PECCOLE RANCH COMMUNITY
ASSOCIATION; AND NEVADA
ASSOCIATION SERVICES, INC.,

Respondents.

Supreme Court Case No. 81446

Electronically Filed
Nov 25 2020 12:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOINT APPENDIX VOLUME 2

Counsel for Appellant:

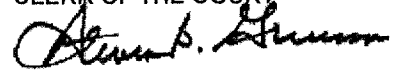
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1 **AFFT**

2 Roger P. Croteau & Associates, Ltd.
3 Roger P. Croteau, Esq.
4 9120 W. Post Rd., Suite 101
5 Las Vegas, NV 89148
6 State Bar No.: 4958
7 Attorney(s) for: Plaintiff

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 Saticoy Bay, LLC, Series 9720 Hitching Rail, a
11 Nevada limited liability company

Case No.: A-19-791797-C

Dept. No.: 15

Plaintiff(s),

vs.

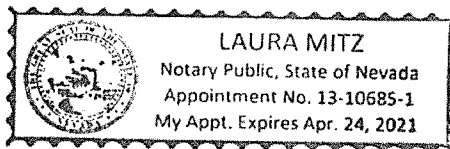
Date:
Time:

11 Peccole Ranch Community Association, a Nevada
12 non-profit corporation, et al.

Defendant(s).

AFFIDAVIT OF SERVICE

14 I, **Diana Brown**, being duly sworn deposes and says: That at all time herein Affiant was and is a citizen of
15 the United States, over 18 years of age, licensed to serve civil process in the state of Nevada under
16 license #1926, and not a party to or interested in the proceeding in which this Affidavit is made. The
17 Affiant received 1 copy of the: Summons; Complaint; Exhibit on the 16th day of April, 2019 and
18 served the same on the 17th day of April, 2019 at 9:40am by serving the Defendant, Peccole Ranch
19 Community Association, a Nevada non-profit corporation, by personally delivering and leaving a
20 copy at Registered Agent, Michael T. Schulman, 3556 E. Russell Rd., 2nd Fl., Las Vegas, NV 89120
21 with Nina Miller, Legal Secretary, pursuant to NRS 14.020 as a person of suitable age and discretion at
22 the above address, which address is the address of the resident agent as shown on the current certificate
23 of designation filed with the Secretary of State.



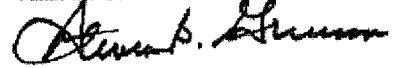
24 **State of Nevada, County of Clark**
25 **SIGNED AND SWORN to before me on this**
26 **18th day of April, 2019**

By: Diana Brown

Notary Public:

Affiant: Diana Brown
#: R-033810

J & L Process Service, License # 1926
Work Order No: 19-7232



1 **AFFT**

2 Roger P. Croteau & Associates, Ltd.
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5 Las Vegas, NV 89148
6 State Bar No.: 4958
7 Attorney(s) for: Plaintiff

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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11 Nevada limited liability company

Case No.: A-19-791797-C

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Plaintiff(s),

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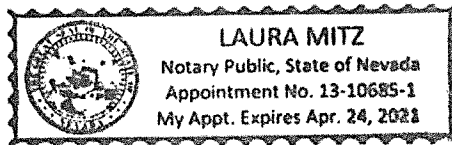
Date:
Time:

11 Peccole Ranch Community Association, a Nevada
12 non-profit corporation, et al.

Defendant(s).

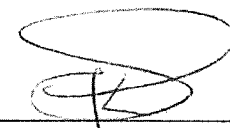
AFFIDAVIT OF SERVICE

14 I, **Susan Kruse**, being duly sworn deposes and says: That at all time herein Affiant was and is a citizen of
15 the United States, over 18 years of age, licensed to serve civil process in the state of Nevada under
16 license #1926, and not a party to or interested in the proceeding in which this Affidavit is made. The
17 Affiant received 1 copy of the: **Summons; Complaint; Exhibit** on the 16th day of April, 2019 and
18 served the same on the 17th day of April, 2019 at 9:01am by serving the **Defendant, Nevada**
19 **Association Services, Inc., a domestic corporation**, by personally delivering and leaving a copy at
20 **New Address of Registered Agent, Chris Yergensen, 6625 S. Valley View Blvd., C300,**
21 **Las Vegas, NV 89118** with **Stacy Dominguez, Office Manager**, pursuant to NRS 14.020 as a person of
22 suitable age and discretion at the above address, which address is the address of the resident agent as
23 shown on the current certificate of designation filed with the Secretary of State.



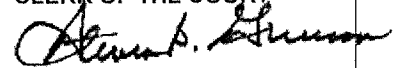
24 **State of Nevada, County of Clark**
25 **SIGNED AND SWORN to before me on this**
26 **18th day of April, 2019**

By: Susan Kruse


Affiant: Susan Kruse
#: 1469

27 
28 Notary Public:

J & L Process Service, License # 1926
Work Order No: 19-7233



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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY, LLC SERIES 9720
HITCHING RAIL, a Nevada limited liability
company,

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PECCOLE RANCH COMMUNITY
ASSOCIATION; and NEVADA
ASSOCIATION SERVICES, INC.,
Defendants.

CASE NO.: A-19-791797-C

Department: 15

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY
JUDGMENT**

REPLY IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Defendants Peccole Ranch Community Association, ("HOA"), and Nevada Association Services, ("NAS") (collectively, "Defendants"), submit their Reply in Support of Motion To Dismiss or for Summary Judgment against Saticoy Bay, LLC Series 9720 Hitching Rail ("Plaintiff" or "Purchaser").

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1 This reply is made and based upon the attached memorandum of points and
2 authorities, the pleadings on file, the exhibits attached hereto, and any argument the
3 Court may consider.

4 DATED this 1st day of October, 2019.

5 LIPSON NEILSON P.C.

6 */s/ Amanda A. Ebert*

7 By:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Opposition to Defendant's Motion to Dismiss argues that dismissal of the complaint, or alternatively summary judgment in favor of Defendants, is improper because: 1) this Court does indeed have jurisdiction over this matter, as NRS 38.310 does not apply and pre-suit mediation was not necessary; 2) NRS 38.310 applies to the allegations against the HOA trustee; 3) the HOA had a duty to disclose the attempted payment to the purchaser at the foreclosure sale and did not do so; 4) there is evidence that the Defendants failed to "conduct their obligations in good faith" under NRS 116.1113; 5) Plaintiff is entitled to special damages and 6) Plaintiff is entitled to punitive damages. As outlined in Defendant's Motion, and as discussed below, Plaintiff's entire complaint is ripe for dismissal.

Overall, Plaintiff cannot show that the foreclosure sale at issue did not comply with NRS 116. As all of the claims raised in Plaintiff's complaint rely on this allegation, all of Plaintiff's claims fail as a matter of law. Dismissal of the Complaint, or alternatively, summary judgment in favor of Defendants, is appropriate. Even if this Court is not inclined to dismiss the Complaint in its entirety, as discussed below, several of Plaintiff's causes of action (namely conspiracy and negligent representation) and claims for damages (punitive damages and special damages) are ripe for dismissal.

II. LEGAL ARGUMENT

a. MEDIATION REQUIRED UNDER NRS 38.310 WAS NOT CONDUCTED.

Pursuant to NRS 38.310(1)(a), this matter should have been "submitted to mediation" prior to being filed before this Court. Because it was not, dismissal is appropriate pursuant to NRS 38.310(2). However, Plaintiff argues that NRS 38.310 does not apply here, as it is not implicated in the allegations of Plaintiff's Complaint.¹ Plaintiff argues that, because this Court is not tasked with the interpretation, application

¹ Plaintiff's Opposition at 15:27-28.

1 or enforcement of CC&Rs, that mediation prior to filing the complaint was simply not
2 necessary. This is incorrect.

3 Plaintiff's Complaint lists four causes of action: intentional or negligent
4 misrepresentation; breach of duty of good faith; conspiracy, and violation of NRS 113, et
5 seq.² This is not an action for quiet title. At issue is whether or not the HOA violated a
6 statutory or contractual obligation to Plaintiff. To determine these issues, and to
7 determine whether Plaintiff's causes of action are viable, the Court must look not only at
8 the applicable sections of NRS 116, but also at the CC&Rs themselves.³ Because
9 NRS 116.1113 is at issue here, Plaintiff's claims should be dismissed, as the matter
10 should have gone to mediation prior to filing of the Complaint.

11 **b. PLAINTIFF'S INTENTIONAL OR NEGLIGENT REPRESENTATION**

12 **CLAIMS FAIL AS A MATTER OF LAW**

13 Plaintiff's Opposition argues that its intentional or negligent representation
14 claims, as well as its fraud claims, are supported by sufficient evidence and law and
15 should withstand dismissal or summary judgment. Plaintiff relies heavily on *Foster v.*
16 *Dingwall*, 126 Nev. 56 (Nev. 2010), in an attempt to prove that the HOA's alleged failure
17 to disclose the bank's tender prior to the sale can give rise to a claim for intentional or
18 negligent representation, as well as an individual claim for fraud.⁴ However, *Foster*
19 does not apply here, as Plaintiff argues. *Foster* involved various conspiracy and fraud
20 claims between a corporation and its directors, and included intervening
21 misrepresentation claims brought by shareholders. However, *Foster's* discussion of
22 intentional misrepresentation was limited to a finding that the shareholders did not
23 present sufficient evidence to establish a claim. *Id.* At 1052. There is simply no
24 correlation between *Foster* and the statutory obligations of an HOA pursuant to

25 _____
26 ² Plaintiff's Complaint, on file herein.

27 ³ See *Mcknight Family, LLP v. Adept Mgmt.*, 310 P/3d 555, 558-559, 129 Nev. 610, 615 (Nev. 2013).

28 ⁴ Opposition at 28:10-28.

1 NRS 116.

2 Plaintiff has not identified any facts showing that the HOA and its agent
3 intentionally misrepresented any issues related to tender here. Interestingly, Plaintiff's
4 Opposition *admits*: "In this case, the HOA is not guilty of a false representation, but it is
5 guilty of intentionally not disclosing a material fact regarding the payment..."⁵ In
6 addition to this admission, Plaintiff presents no deposition testimony, affidavit, or other
7 evidence showing that a false representation was made with knowledge of its false
8 nature and with the intent to induce Plaintiff's reliance on the same. See generally,
9 *Nelson v. Heer*, 123 Nev. 217 (Nev. 2007). Plaintiff argues that "the HOA Trustee
10 conducting the sale had actual knowledge of the Attempted Payment" and committed
11 "an intentional omission in not disclosing the Attempted Payment that is equivalent to a
12 false representation under the facts of this case."⁶ This argument is nothing more than
13 an attempt to create a duty to disclose that *did not exist*, and to impute that duty onto
14 the HOA. Nevada law is clear: a lien is not a "defect," a conditional tender by the bank
15 is not a "defect," and there is no duty to disclose either the lien or the tender under NRS
16 113(4).

17 Attached to Plaintiff's Opposition is a declaration of Eddie Haddad. Mr. Haddad's
18 declaration states that, when attending NRS 116 sales such as the one at issue here,
19 he would "attempt to ascertain whether anyone had attempted to or did tender any
20 payment regarding the homeowner's lien."⁷ If he did learn that a tender had been either
21 attempted, or made, then he would not purchase the property being sold. His
22 declaration also attests that he would rely on announcements made at HOA foreclosure
23 sales, and that he "relied on the HOA Foreclosure Deed that provided that the HOA and
24

25 _____
26 ⁵ Opposition 28:7-9

27 ⁶ Opposition 28:15-18.

28 ⁷ Declaration of Eddie Haddad, attached as Exhibit 1 to Plaintiff's Opposition.

1 HOA trustee complied with all requirements of law.”⁸ Mr. Haddad’s declaration
2 references foreclosure sales, in a general sense, and does not provide any facts
3 specific to the case at hand, let alone any facts showing that there was a false
4 representation or intentional omission made by the HOA here. The declaration avers to
5 Mr. Haddad’s general policies and procedures regarding foreclosure sales, and does
6 not specify any time periods. Mr. Haddad’s declaration does not offer the factual
7 information necessary to overcome dismissal or summary judgment accordingly.

8 **c. PLAINTIFF’S CONSPIRACY CLAIM FAILS AS A MATTER OF LAW**

9 Plaintiff’s Opposition does not state any fact showing that it can meet the first
10 prong of the mandatory test to find civil conspiracy: that the Defendants “by acting in
11 concert, intended to accomplish an unlawful objective for the purpose of harming
12 plaintiff.” *See Consol. Generator- Nevada, Inc. v. Cummins Engine Co*, 114 Nev. 1304,
13 971 P.2d 1251 (1998). While Plaintiff claims that it has pled sufficient facts in its
14 Complaint to support this cause of action, there are no facts showing what this “unlawful
15 objective” was. There is no allegation that a crime was committed, or that the
16 Defendants intended to commit a crime. Without such specific allegations, this cause of
17 action fails as matter of law.

18 Further, in its Opposition, Plaintiff requests NRCP 56(d) relief to allow it to
19 conduct additional discovery regarding its conspiracy claim. Rule 56(d) states:

- 20 (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant
21 shows by affidavit or declaration that, for specified reasons, it cannot
22 present facts essential to justify its opposition, the court may:
23 (1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

24 Plaintiff does not, by affidavit or declaration, specify *what* discovery it intends to conduct
25 in relation to the conspiracy issue, or the specific reasons why it cannot present facts
26 regarding this issue now. Because 56(d) relief cannot be granted without this

27 _____
28 ⁸ *Id.*

1 supporting information, Plaintiff lacks the factual evidence needed to support this cause
2 of action and it must be dismissed.

3 **d. THE DUTY OF GOOD FAITH DOES NOT IMPOSE EXTRA-**
4 **STATUTORY DUTIES ON THE HOA OR ITS AGENT**

5 While Plaintiff is correct that NRS 116.1113 does impose an obligation of good
6 faith on every contract or duty governed by the chapter, the statute still does not impose
7 extra-statutory duties on an HOA. Instead, it only governs *existing* contracts and duties.
8 See PennyMac Corp v. SFR Investments Pool 1, LLC, 2018 WL 4413612 at *3 (Nev.
9 2018; unpublished).⁹

10 Here, Plaintiff has not identified any specific deficiencies regarding the HOA's
11 compliance with notice and recording requirements (as required by NRS 116 at the time
12 of the sale). Plaintiff also fails to mention that the HOA was actually *prohibited* from
13 giving any purchaser at auction a so-called warranty deed. See NRS 116.31164(3)(a).
14 While Plaintiff clearly believes that the HOA could have done so, this is incorrect, and
15 what the HOA may have done does not create a duty, nor does it give rise to a violation
16 of statute. Similarly, Plaintiff's argument that the HOA was required to disclose the
17 existence of tender pursuant to NRS 113.130 (the statute governing the disclosure of
18 *defects* to residential property, as well as services, land uses, and zoning) is also simply
19 misplaced.

20 NRS 113.100(1) defines a "defect" as "a condition that materially affects the
21 value or use of residential property in an adverse manner."¹⁰ A seller is not required to
22 disclose defects that he is unaware of. *Nelson v. Heer, Id.* at 224. Plaintiff cites to no
23 authority showing that NRS 113.130 applies to disclosure of potential risks associated
24 with purchasing property at an NRS 113 foreclosure sale. Overall, the bank's pre-sale

25 ⁹ In PennyMac, the Court held: "Accordingly, we are not persuaded that the agent's failure to undertake
26 the extra-statutory duty. . . amounts to unfairness sufficient to set aside the sale." 2018 WL 4413612 at
27 *3.

28 ¹⁰ As an aside, most Nevada authority interpreting NRS 113.130 involve a seller's obligation to disclose a
physical defect in real property.

tender does not fall within any of the disclosure categories contemplated by NRS 113. Accordingly, Plaintiff lacks evidence of a breach of duty of good faith here. This cause of action is ripe for dismissal.

e. PLAINTIFF'S SPECIAL DAMAGES CLAIMS ARE UNSUPPORTED AND SHOULD BE DISMISSED

In its Opposition, Plaintiff argues that its special damages, including the claim for attorney fees and costs, may be awarded following trial if Plaintiff is the prevailing party. Plaintiff further argues that this issue may be addressed during discovery. These arguments lack merit.

Under Nevada law, special damages must be pled with specificity. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n.*, 35 P.3d 964, 970, 117 Nev. 948, 958 (Nev. 2001). Here, Plaintiff simply lists attorney's fees in the ad damnum of its Complaint, but merely mentioning these fees as a general prayer for relief is insufficient. Because Plaintiff's claim for special damages lacks the necessary specificity, it should be dismissed.

f. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

Finally, Plaintiff is not entitled to punitive damages, and they should be dismissed as well. Plaintiff argues in its opposition that punitive damages are permissible against an HOA in certain situations, which should be addressed on a case-by-case basis, pursuant to NRS 116.4117. This is untrue. NRS 116.3111(5)(a) is clear: "Punitive damages may not be awarded against. . . the association." The statute does not allow for punitive damages against an HOA on a case-by-case basis. It does not allow punitive damages against an HOA, with no caveats. Plaintiff's claim for punitive damages fails as a matter of law and should be dismissed.

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Overall, because Plaintiff failed to comply with pre-suit mediation under NRS 38.310, because there are no genuine factual disputes, and because of Plaintiff's failure to state a sufficient claim under NRCP 12(b)(5), Defendants respectfully request that this Court grant the motion to dismiss, or that this Court grant summary judgment in favor of Defendants.

Even if this Court is not inclined to grant summary judgment or dismiss the complaint in its entirety, at the very least, several of Plaintiff's claims should be dismissed, and the Motion should be granted in part. Again, because Plaintiff's claim of civil conspiracy fails as a matter of law, at a minimum, that cause of action should be dismissed. Further, Plaintiff's claims for special damages and punitive damages also fail as a matter of law, and should likewise be dismissed.

LIPSON NEILSON P.C.

By:

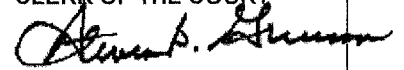
JA243

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, service of the foregoing **PECCOLE RANCH COMMUNITY ASSOCIATION'S AND NEVADA ASSOCIATION SERVICES, INC.'s REPLY IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT** to the Clerk's Office using the Odyssey eFileNV and Serve system for filing and transmittal to the following Odyssey eFileNV and Serve registrants:

Roger P. Croteau, Esq. ROGER P. CROTEAU & ASSOCIATES, LTD. 2810 W. Charleston Blvd. Ste.75 Las Vegas, NV 89148 croteaulaw@croteaulaw.com <i>Attorney for Plaintiff</i>	
---	--

/s/ Sydney Ochoa
Employee of LIPSON NEILSON P.C.



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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY, LLC SERIES 9720
HITCHING RAIL, a Nevada limited liability
company,

Plaintiff,

v.

PECCOLE RANCH COMMUNITY
ASSOCIATION; and NEVADA
ASSOCIATION SERVICES, INC.,
Defendants.

CASE NO.: A-19-791797-C

Department: 15

**ORDER GRANTING PECCOLE
RANCH COMMUNITY ASSOCIATION
AND NEVADA ASSOCIATION
SERVICES' MOTION TO DISMISS OR
IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT**

This Court, having considered the pleadings on file together with the oral arguments of counsel, orders the Motion to Dismiss or in the Alternative for Summary Judgment Granted in part and Denied in part. During the hearing, the Court held the following:

(1) despite Plaintiff's arguments, it did appear that NRS 38.310 was implicated in the instant case;

(2) the instant case was hereby DISMISSED WITHOUT PREJUDICE, as the language contained in NRS 38.310 required mandatory, pre-litigation mediation through the Nevada Real Estate Division (NRED) in a civil action related to the

enforcement of CC&Rs;

(3) under NRS 38.310(1)(a) and NRS 38.310(2), mandatory dismissal was required, if parties failed to participate in pre-litigation NRED mediation;

(4) the instant case was not an action related to title of property; therefore, that exception under NRS 38.300(3), would not apply;

(5) the instant case was an action for money damages or equitable relief; therefore, there was no threat of irreparable harm, as the case did not deal with title to real property;

(6) under the McKnight case, the Supreme Court read NRS 38.310(a) fairly broadly;

(7) if the parties did not successfully resolve their claims through the NRED mediation process, the case could be filed again; and

(8) due to the Court's ruling, the Court did not get to any of the alternative arguments regarding substance or summary judgment.

DATE: March __, 2020.

**ROGER P. CROTEAU & ASSOCIATES,
LTD.**

Refused

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Attorney for Plaintiff

DATE: March 13th, 2020.

LIPSON NEILSON P.C.

[Signature]

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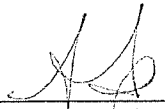
THEREFORE, this Court ORDERS Motion GRANTED IN PART WITHOUT
PREJUDICE and DENIED IN PART WITHOUT PREJUDICE.

Dated this 17th day of March, 2020.


DISTRICT COURT JUDGE 10

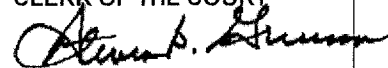
Respectfully Submitted by:

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Electronically Filed
6/3/2020 10:56 AM
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CLERK OF THE COURT



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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY, LLC SERIES 9720
HITCHING RAIL, a Nevada limited liability
company,

Plaintiff,

v.

PECCOLE RANCH COMMUNITY
ASSOCIATION; and NEVADA
ASSOCIATION SERVICES, INC.,
Defendants.

CASE NO.: A-19-791797-C

Department: 15

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Order Granting Peccole Ranch Community Association and Nevada Association Services' Motion to Dismiss or in the Alternatively for Summary Judgment was filed with the court this 19th day of March, 2020, a copy of which is attached.

DATED this 3rd day of June, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert

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1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 3rd day
3 of June, 2020, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER**
4 to the Clerk's Office using the Odyssey eFileNV and Serve system for filing and
5 transmittal to the following Odyssey eFileNV and Serve registrants:

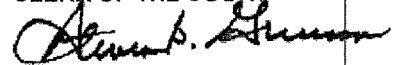
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14 Employee of LIPSON NEILSON P.C.

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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY, LLC SERIES 9720
HITCHING RAIL, a Nevada limited liability
company,

Plaintiff,

v.

PECCOLE RANCH COMMUNITY
ASSOCIATION; and NEVADA
ASSOCIATION SERVICES, INC.,
Defendants.

CASE NO.: A-19-791797-C

Department: 15

**ORDER GRANTING PECCOLE
RANCH COMMUNITY ASSOCIATION
AND NEVADA ASSOCIATION
SERVICES' MOTION TO DISMISS OR
IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT**

This Court, having considered the pleadings on file together with the oral arguments of counsel, orders the Motion to Dismiss or in the Alternative for Summary Judgment Granted in part and Denied in part. During the hearing, the Court held the following:

(1) despite Plaintiff's arguments, it did appear that NRS 38.310 was implicated in the instant case;

(2) the instant case was hereby DISMISSED WITHOUT PREJUDICE, as the language contained in NRS 38.310 required mandatory, pre-litigation mediation through the Nevada Real Estate Division (NRED) in a civil action related to the

enforcement of CC&Rs;

(3) under NRS 38.310(1)(a) and NRS 38.310(2), mandatory dismissal was required, if parties failed to participate in pre-litigation NRED mediation;

(4) the instant case was not an action related to title of property; therefore, that exception under NRS 38.300(3), would not apply;

(5) the instant case was an action for money damages or equitable relief; therefore, there was no threat of irreparable harm, as the case did not deal with title to real property;

(6) under the McKnight case, the Supreme Court read NRS 38.310(a) fairly broadly;

(7) if the parties did not successfully resolve their claims through the NRED mediation process, the case could be filed again; and

(8) due to the Court's ruling, the Court did not get to any of the alternative arguments regarding substance or summary judgment.

DATE: March __, 2020.

**ROGER P. CROTEAU & ASSOCIATES,
LTD.**

Refused

Roger P. Croteau, Esq.
Nevada Bar No. 4958
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Attorney for Plaintiff

DATE: March 13th, 2020.

LIPSON NEILSON P.C.

[Signature]

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Saticoy Bay, LLC Series 9720 Hitching Rail v.
Peccole Ranch Community Association
Case No. A-19-791797-C

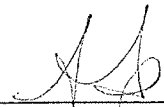
THEREFORE, this Court ORDERS Motion GRANTED IN PART WITHOUT
PREJUDICE and DENIED IN PART WITHOUT PREJUDICE.

Dated this 7th day of March, 2020.


DISTRICT COURT JUDGE 10

Respectfully Submitted by:

LIPSON NEILSON P.C.

By: 

Kaleb D. Anderson, Esq.

Amanda A. Ebert, Esq.

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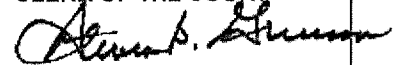
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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 SATICOY BAY, LLC, SERIES 9720
12 HITCHING RAIL, a Nevada limited liability
13 company,

14 Plaintiff,

15 vs.

16 PECCOLE RANCH COMMUNITY
17 ASSOCIATION; a Nevada non-profit
18 corporation; NEVADA ASSOCIATION
19 SERVICES, INC., a domestic corporation,

20 Defendants.

Case No. A-19-791797-C
Dept No. 15

NOTICE OF APPEAL

21 NOTICE IS HEREBY GIVEN that Plaintiff Saticoy Bay, LLC Series 9720 Hitching Rail, by
22 and through its attorneys, Roger P. Croteau & Associates, Ltd., hereby appeals to the Supreme Court
23 of Nevada from:

24 ...

25 ...

26 ...

27 ...

1 (1) the Order Granting Peccole Ranch Community Association and Nevada Association Services'
2 Motion to Dismiss or in the Alternative for Summary Judgment; and (2) all rulings and interlocutory
3 orders giving rise to or made appealable by the final judgment.

4 Dated this 2nd day of July, 2020.

5 ROGER P. CROTEAU & ASSOCIATES, LTD.

6 /s/ Chet A. Glover

7 Roger P. Croteau, Esq.

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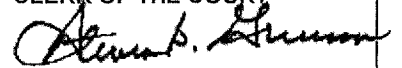
13 Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020 I served the foregoing document on all persons and parties in the E-Service Master List in the Eighth Judicial District Court E-Filing System, by electronic service in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules.

/s/ Joe Koehle
An employee of
ROGER P. CROTEAU & ASSOCIATES, LTD.



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SATICOY BAY, LLC, SERIES 9720)
HITCHING RAIL,)

CASE NO. A-19-791797

Plaintiff,)

DEPT. NO. XV

vs.)

PECCOLE RANCH COMMUNITY)
ASSOCIATION, NEVADA)
ASSOCIATION SERVICES, INC.)

Transcript of Proceedings

Defendants.)

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE
**DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT**
OCTOBER 7, 2019

APPEARANCES:

For the Plaintiff: ROGER P. CROTEAU, ESQ.

For the Defendants: AMANDA A. EBERT, ESQ.

RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

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OCTOBER 7, 2019 AT 10:08 A.M.

THE COURT: A791797, *Saticoy Bay versus Peccole Ranch Community Association*.

MR. CROTEAU: Good morning, Your Honor. Roger Croteau for Saticoy Bay, LLC, Series 9720 Hitching Rail.

MS. EBERT: Good morning, Your Honor. Amanda Ebert for defendants, Peccole Ranch Community Association and Nevada Association Services.

THE COURT: Good morning. So, I reviewed the -- oh, Defendants' Motion, sorry. In these HOA cases, it's always hard to remember.

MR. CROTEAU: I understand. Your Honor, we bounce sides.

MS. EBERT: It's hard for us, too.

THE COURT: Yeah, which side is defendant and which side is plaintiff.

So, I've reviewed Defendant Peccole Ranch's Motion to Dismiss or, In Alternative, Motion for Summary Judgment, then, plaintiff, Saticoy Bay, etcetera's Opposition, and the Reply, as well. And I welcome arguments of counsel.

MS. EBERT: Good morning, Your Honor. And I understand that the Court is familiar with these HOA matters and I understand that this matter was pretty

1 thoroughly briefed. So I won't belabor the point.

2 This is a nonjudicial foreclosure sale. The only
3 deed permitted at this type of sale is a deed without
4 warranty, a non-warranty deed. A non-warranty deed, like
5 this, does not create liability for the HOA. The non-
6 warranty nature of the deed was disclosed in the recorded
7 Notice of Sale. The non-warranty deed was disclosed on the
8 Foreclosure Deed itself and the sale complied with the
9 statute. Because of the non-warranty status of the deed,
10 our position is that all of plaintiff's claims fail as a
11 matter of law.

12 On top of this issue, as we detailed in the
13 briefing, this case did not go to mediation, as required by
14 NRS 38.310. We believe that that is another grounds for
15 dismissal.

16 Something else that I'd like to point out is that
17 the fraud and conspiracy claims both fail as a matter of
18 law. I believe that especially with a conspiracy cause of
19 action, there needs to be evidence of an unlawful
20 objective. It's unclear what that would even be in this
21 case. So, at a bare minimum, fraud and conspiracy fail as
22 a matter of law here.

23 Also, regarding the damages themselves, the
24 special damages claim -- special damages has to be plead in
25 specificity. That wasn't done here. The fact that it was

1 just mentioned by name is insufficient. So, special
2 damages, at a minimum, can be dismissed.

3 Punitive damages are likewise not appropriate
4 here. Under NRS 116.3111, punitive damages may not be
5 awarded by -- against an HOA. And that's the statute and I
6 believe that that's fairly clear.

7 So, we -- I'll rest on that.

8 THE COURT: Thank you. Mr. Croteau.

9 MR. CROTEAU: Thank you, Your Honor.

10 I'm not sure what counsel calls special damages.
11 Our prayer for relief is damages proven at a trial in
12 excess of 15,000, punitive as determined by the Court,
13 attorneys' fees, and pre-judgment/post-judgment interest.

14 In any event, these cases, and this line of cases,
15 flows from whether or not upon questioning, whether or not
16 upon inquiry, a bidder is supposed to be informed that a
17 tender has been made. That's the issue. The issue is not
18 whether or not the statute says there is an obligation for
19 them to provide notice, regardless of inquiry. That's not
20 the argument we're making. The argument we're making is:
21 Upon inquiry, do they have a duty under the damage
22 provisions of NRS 116.113, okay, and its progeny, and the
23 good faith provisions that even if we look underlying
24 statute, and I think that's relevant, the underlying
25 Uniform Act.

1 The Uniform Act specifically says, and I have
2 citations to that as well, that -- it's on page 20 of the
3 brief. From the Uniform Act, there's a comment and under
4 *Carrington*, even the *SFR* decision, and so forth, they say:
5 Look at the Uniform Act to at least get some guidance. And
6 it says:

7 The section sets forth a basic principle running
8 throughout this Act. In transactions involving common
9 interest communities, good faith is required in the
10 performance and enforcement of all agreements and
11 duties.

12 Well, the duty is the foreclosure. Right? And
13 there's a section within the statute that even references a
14 purchaser at the time of sale and that definition is found
15 in NRS 116.31166. But the definition of good faith says:

16 Good faith is used in this Act means the
17 observance of two standards, honesty in fact and
18 observance of reasonable standards of fair dealing.

19 It says: While the term is not defined, the term
20 is derived from and used in the same manner as in
21 section 1-201 of the Uniform Simplification of Land
22 Transfers Act, and so on.

23 The point being is there's more to good faith than
24 simply, you know, have a good day. It is: If I ask you a
25 question, do you get to lie? Do you get to make a material

1 omission and not say it, because there's an ulterior --

2 THE COURT: So, let --

3 MR. CROTEAU: -- motive.

4 THE COURT: -- me pause you because I think --

5 MR. CROTEAU: Sure.

6 THE COURT: -- I know what you're saying, but I
7 want to make sure.

8 So, -- because earlier you referred a couple of
9 times to, upon inquiry, and now you're saying: Well, you
10 know, upon inquiry, do you get to lie? So, is the
11 Complaint alleging that Saticoy Bay asked Peccole Ranch
12 whether a tender was made?

13 MR. CROTEAU: The Complaint is setting forth -- if
14 I may?

15 THE COURT: Sure.

16 MR. CROTEAU: Sorry.

17 THE COURT: Yeah. Take your time. That's fine.

18 [Pause in proceedings]

19 MR. CROTEAU: Now, there's usually a section in my
20 Complaint for it, but there's also an Affidavit in support
21 -- or a Declaration, I should say, in support of the
22 Motion. And that, generally, is Exhibit 1. So, let's see.
23 Yeah, it is, Your Honor.

24 And, in Exhibit 1, it's Mr. Haddad's Declaration
25 where he says that:

1 I further provide that it is my practice and
2 procedure set forth herein that when I would attend NRS
3 116 sales at all times relevant to this case, I would
4 attempt to ascertain whether anyone had attempted to or
5 did tender any payment regarding the Homeowner's
6 Association lien. If I learned that a tender had been
7 either attempted or made, I would not purchase the
8 property offered in the foreclosure sale. I would and
9 did rely on whether whatever recital and/or
10 announcements that were made at the HOA foreclosure
11 sale. I also relied on the HOA Foreclosure Deed that
12 provided that the HOA complied with all law.

13 And that's the two things. You know, counsel says
14 it's a non-warranty deed. It's a non-warranty deed and
15 here's why it's non-warranty, Your Honor. Non-warranty
16 deed is a standard language in a foreclosure sale because,
17 generally, the foreclosing parties have no knowledge of the
18 property. All right? That's not the case in this case.
19 In NRS 116 sales, the HOA has actual knowledge of many of
20 the aspects of the property, as does the HOA Trustee.

21 In this particular case, there is no public record
22 of tender at this time frame. Okay? It's new now and, as
23 of the 2015 amendment, it's changed. But prior to that, at
24 the time of this sale, the only parties that had the
25 information regarding tender would be the tending bank of,

1 which we have no privity with, no ability to find anything
2 out from, and they won't talk to us, or the HOA and the HOA
3 Trustee. The HOA Trustee certainly has the tender
4 information and by agency relationships or actual
5 information the HOA knows. The only place to get the
6 information is from them.

7 Now, it has such a diametric change on the value
8 of what you're purchasing is to even whether or not it's
9 worth purchasing. And if there's any inquiry made, do you
10 have an obligation to say?

11 THE COURT: Yeah, but, see, I'm still asking
12 though -- I mean, it seems that your argument --

13 MR. CROTEAU: I want to answer whatever question
14 you're looking for. And I apologize, so, --

15 THE COURT: No. That's okay. So, I -- it may be
16 my fault, so don't worry about it.

17 But, you know, you're saying upon inquiry, which,
18 to me, indicates you're saying: Well, Saticoy Bay at some
19 point asked the HOA or its agent whether a tender had been
20 made or not. But, like reading Mr. Haddad's Declaration,
21 doesn't say that he actually inquired. It said: I would
22 attempt to ascertain. If I learned that was, but he's not
23 -- at least it doesn't appear to be in, and neither in the
24 Complaint, that an inquiry was actually made. So, that's
25 kind of --

1 MR. CROTEAU: He -- and it's a fact question, Your
2 Honor, which I would allege that survives summary judgment
3 from that point of view. But here's why. The testimony
4 that would be adduced at trial is that in the early days of
5 the foreclosure process, it was always my client's opinion,
6 and Your Honor knows, I represent LBDG [phonetic], and
7 Thunder Properties, and Saticoy Bay. It was that group of
8 folks, we had the view and it was our theory of the law
9 that if there was a tender made, the first would survive.
10 So, we were always curious, always concerned, and it was
11 one of our top priorities at that point in time. Now,
12 people may not have thought that, but it was ours at that
13 point because we were concerned and that was our view of
14 the way it turned out. And, frankly, it did turn out that
15 way.

16 So, it was a question asked. The problem we had
17 as a group is that the HOAs and the HOA Trustees would
18 affirmatively refuse, in many cases, to not tell us.

19 THE COURT: To disclose whether or not --

20 MR. CROTEAU: Correct. So, you're back to almost
21 like a *Jessup* argument. You know, inquiry was absolutely
22 made. At some point, it became futile. Now, whether it
23 was in this one or not, Mr. Haddad has purchased so many
24 properties. I didn't want to perjure him by saying: I
25 remember specifically this sale in 2014 and I can tell you,

1 because that's not what he's going to be able to tell you.
2 He's not going to have that kind of recollection because
3 the real inquiry is going to be: Did you know there was a
4 tender made, folks? You know, did you know that people
5 wanted to know that? Did you frustrate this purpose over
6 time by not telling them? NAS has been around for, you
7 know, many of our [indiscernible], let's face it. So, I
8 mean, we have that breadth and depth of testimony to be
9 adduced from them even on these issues.

10 And, as the Court's aware, too, I mean, a lot of
11 these things changed over time. I mean, Kelly Mitchell, up
12 until like 2013, late 2014, started announcing payments.
13 So, things change this timeline and that was before any law
14 changes.

15 So, the bottom line is, you know, I hook in, if
16 you will, for purposes of creating a standard, that the
17 Deed says they required -- they complied with all law.
18 Well, it may be a Non-Warranty Deed, but if you make a
19 representation that you complied with all law, you need to.
20 NRS 113 is not exempt from the 116 sale. It's exempt from
21 107 sale, but, even in that case, I provided the NRED
22 Guide, Your Honor. And even the NRED Guide says a Bank
23 Trustee who is selling a house, even under a 107 sale who
24 has actual knowledge -- you'll find that on page 20 of the
25 last exhibit. It says that you have to disclose that.

1 Well, if you have to disclose that under a 107
2 sale, if you have actual knowledge, on a 116 sale, it's not
3 exempt. Don't you have to disclose the things you actually
4 know that affect the value of the property and go to the
5 basis of what you're purchasing? And that is the essence
6 of the 113.130 argument. 113.130 says: Look, HOA payments
7 are in there. Those are part of the disclosures and I've
8 provided that. I think it's Exhibit 3. But it lists even
9 that as a part of the disclosures.

10 And all we were saying is even in *Noonan*, the most
11 recent -- it's an unpublished decision. I'm sure the
12 Court's heard about it. All right. But it was an April
13 decision. The Court made a decision there and said that in
14 the absence -- well, it said it did not make any false
15 statements, is what it says. Or it did not omit any false
16 statements. And that's what the *Noonan* case says.

17 Well, they made a factual determination that
18 that's what occurred. I'm suggesting that that is the
19 essence of what we're doing here because we're going to
20 argue about whether or not an omission was made and it
21 would be clearly a material one if they knew it, but the
22 *Noonan* decision, which I cite on page 16, says:

23 The Noonans challenge a District Court summary
24 judgment in favor of Hampton and Hampton Collections,
25 LLC on their negligent misrep and deceptive trade

1 practice.

2 Well, negligent misrep is essentially our fraud
3 claim when we titled it both ways.

4 Summary judgment was appropriate on the negligent
5 misrep claim because Hampton neither made an
6 affirmative false statement nor omitted a material fact
7 it was bound to disclose.

8 And, then, frankly, it goes on to, in the same
9 *Noonan* citation, cite my language, where it says:

10 The suppression or omission of a material fact
11 which a party is bound in good faith to disclose is
12 equivalent to a false misrepresentation.

13 The point being is they made a factual
14 determination after evidence in *Noonan* that they didn't
15 make one. I'm suggesting to the Court, and Judge Gonzalez
16 has allowed this to go forward as well, is that it's a
17 factual determination whether they materially omitted
18 information that they knew on some --

19 THE COURT: So, let me --

20 MR. CROTEAU: -- sort of inquiry.

21 THE COURT: No, I see what you're saying. Let me
22 ask -- so, the other related -- well, the other argument
23 they make in the Motion is, hey, this is an action -- civil
24 action relating to, essentially, the CC&Rs, enforcement,
25 that type of thing, and --

1 MR. CROTEAU: Right.

2 THE COURT: -- because we haven't had the
3 mediation must be dismissed.

4 MR. CROTEAU: Right.

5 THE COURT: How do you address that?

6 MR. CROTEAU: They have -- as far as I know,
7 they've made this argument many times and have been
8 successful on it zero times. Here's why.

9 NRS 38.310 says no civil action based upon a claim
10 relating to the interpretation of -- essentially, Your
11 Honor, the CC&Rs, the bylaws, rules, and regulations. I'm
12 not asking for any of that. Okay? I'm also not asking for
13 the second prong of what it works with and that's B. It
14 says:

15 The procedures used for increasing, decreasing, or
16 imposing additional assessments.

17 38.310 isn't applicable at all. And we're arguing
18 -- excuse me. We're arguing about the foreclosure process,
19 not from the point that we actually own the property.
20 There is nothing in this Complaint that alleges a thing
21 after ownership has been acquired. Okay? This -- all of
22 the actions, and misactions, and the arguments that are
23 made are made up to and including the foreclosure sale
24 itself, process of what they did. It's not defective. The
25 notices were not defective. So, there is no issue of

1 defective sale. There is an issue of whether or not they
2 have a do-good faith obligation under 116 to disclose
3 material information known to them. That's really it.
4 Upon inquiry, of course, or some sort of fashion of
5 inquiry. That's the essence of the case.

6 38.310, a nice try, but it just isn't on point.
7 I'm not asking for an interpretation of CC&Rs. I'm asking
8 for an interpretation of NRS 116 as it relates to the sale.
9 I wasn't even a party to it -- my client wasn't even a
10 party to the CC&Rs at the time of the action giving rise to
11 the claim. I only became a party, or my client did, only
12 became a party to it after purchase. And there's been no
13 dispute, there's no allegations of anything related to
14 that.

15 And those kinds of things would be -- you know,
16 did they properly, you know, do the common areas? Are they
17 raising pricing that the -- on the assessments? Those are
18 the issues that are contemplated, if you will, under
19 28.310. It's the resolve issues are with the homeowner and
20 the HOA prior to litigation, that's why they force you into
21 mediation.

22 Certainly a case like this is not for a mediator
23 at the -- you know, the Real Estate Division to decide the
24 case. So, it's completely off point. I appreciate the
25 effort, but even the terminology of assessments -- and I'll

1 cite you also the Civil Action Section under NRS 38.300.

2 It says:

3 A civil action includes any action for money
4 damages or equitable relief. The term does not include
5 an action in equity for injunction relief in which
6 there is immediate threat or irreparable harm or an
7 action relating to the title to residential property.

8 And, realistically speaking, title has been
9 determined that if there's a lien to the property that
10 consumes, if you will, the entire value of the property,
11 that's tantamount to a lien to title. And that's kind of
12 the caselaw.

13 So, I would respectfully suggest that this is not
14 even applicable. I mean, if the Court was inclined to
15 dismiss the Complaint or for whatever reason, I would
16 assume it would be on one of the other bases. This one is
17 not your main, frankly. It's --

18 THE COURT: Okay.

19 MR. CROTEAU: -- more of a red herring.

20 THE COURT: Thank you very much.

21 MS. EBERT: Your Honor, just briefly regarding Mr.
22 Haddad's Affidavit. It's a typical, boilerplate affidavit
23 that's included. I believe it's included in many -- in
24 support of many similar motions like this. I understand
25 that Mr. Haddad was attending these sales, you know, daily,

1 literally, for --

2 MR. CROTEAU: Literally.

3 MS. EBERT: Literally daily. So, --

4 THE COURT: I've heard him say that many times
5 under oath, so --

6 MS. EBERT: So, I can appreciate that he might not
7 be able to recall the details of this exact sale, but
8 that's not my client's problem. That's not our fault that
9 he didn't keep record of that.

10 His Affidavit adds nothing. His Affidavit doesn't
11 show any evidence of wrongdoing. It doesn't show any proof
12 that he asked the agent about tender. It doesn't have any
13 proof about this specific sale at all. The Affidavit is
14 made in general terms about the sales in general. What he
15 would normally do, not what he did do. So, to us, to my
16 clients, that Affidavit adds nothing to their argument.

17 At the very least, my position is that the
18 intentional or negligent misrepresentation, or the fraud
19 claim, fails as a matter of law. There's just no evidence
20 presented of that. And, also, the conspiracy claim,
21 there's no evidence submitted -- supporting the conspiracy
22 claim. And, finally, punitive damages, they just aren't
23 appropriate here. They can't be awarded against an HOA.

24 So, we request that the Motion at least be granted
25 in part.

1 THE COURT: Thank you very much.

2 Notwithstanding plaintiff's arguments, it seems to
3 me that the NRS 38.310 is implicated here and maybe at some
4 point we'll get another -- yet another HOA Supreme Court
5 case that tells us -- gives us more guidance, but I'm going
6 to grant in part and deny in part, both without prejudice,
7 the Motion to Dismiss or for Summary Judgment. Dismiss
8 without prejudice under NRS 38.310 because a mandatory
9 prelitigation NRED mediation has not occurred and I do
10 believe that this is a civil action based upon a claim or
11 claims relating to interpretation, application, or
12 enforcement of any covenants, conditions, or restrictions
13 applicable to residential property or any bylaws, rules, or
14 regulations adopted by an association, 38.310(1)(a).

15 And, then, under 38.310 subsection 2, mandatory
16 dismissal because it has not gone to NRED mediation. It is
17 not an action relating to title of property and, therefore,
18 that exception under 38.300, subsection 3, doesn't apply.
19 It is an action for money damages or equitable relief.
20 There's no threat of irreparable harm. It's not an action
21 relating to the title for residential property.

22 And, under the *McKnight* case, I believe the
23 Supreme Court reads 38.310(1)(a) fairly broadly and,
24 therefore, it's dismissed without prejudice to go do your
25 NRED mediation and on unsuccessful completion, dismissal

1 being without prejudice, can refile.

2 Based on that, the Court does not get to the other
3 alternative arguments relating to the substance of the
4 claims or for summary judgment because it's simply a
5 dismissal without prejudice under 38.310.

6 So, Ms. Ebert, you'll prepare the Order --

7 MR. CROTEAU: May I -- I need to make a motion,
8 Your Honor.

9 THE COURT: Bear with me a moment.

10 MR. CROTEAU: Yes.

11 THE COURT: Let me --

12 MR. CROTEAU: Yes, Your Honor.

13 THE COURT: Let me finish my sentence or sentences
14 and then --

15 MR. CROTEAU: Sorry.

16 THE COURT: Ms. Ebert, you'll prepare the Order.
17 Submit it to Mr. Croteau for review and approval.

18 MS. EBERT: Thank you.

19 MR. CROTEAU: Your Honor, I need to make a motion
20 then because the -- a dismissal of this case without
21 prejudice is effectively a dismissal with prejudice because
22 this would be a statute of limitations case argument and I
23 would respectfully request that this matter be stayed. The
24 Court rendered its ruling, but the matter is stayed until
25 NRED is completed and then the Court could rule on the

1 remainder of the aspects and the claims, if it's not
2 resolved.

3 MS. EBERT: And the HOA would oppose that request.
4 The statute is fairly clear that the dismissal is
5 appropriate and I believe the Court's ruling is
6 appropriate.

7 THE COURT: I'm going to stick with my ruling. To
8 me, the statute shall dismiss is mandatory for me, rather
9 than not dismissing and staying it. I am not familiar, as
10 I sit here, enough to say: Well, with the dismissal,
11 there's some type of tolling argument or what have you, but
12 the dismissal is without prejudice.

13 MR. CROTEAU: The record's made. That's all I
14 care about. Thank you.

15 THE COURT: Sure.

16 MS. EBERT: Thank you, Your Honor.

17

18 PROCEEDING CONCLUDED AT 10:32 A.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER