IN THE SUPREME COURT OF NEVADA

SATICOY BAY, LLC SERIES 9720 HITCHING RAIL, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. PECCOLE RANCH COMMUNITY ASSOCIATION; AND NEVADA ASSOCIATION SERVICES, Respondents.	Supreme Court Case No. 81446 Electronically Filed Nov 30 2020 10:59 a.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Law firms that have appeared for Saticoy Bay, LLC, Series 9720 Hitching Rail ("Saticoy"): Roger P. Croteau & Associates, Ltd.

2. Parent corporations/entities: Appellant is a Nevada series limited liability company. Appellant's Manager is Bay Harbor Trust, with Iyad Haddad as the trustee of the Bay Harbor Trust. No publicly held corporation owns 10% or more of the beneficial interest in the Appellant and/or the Bay Harbor Trust.

Dated this November 30, 2020

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II. JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The Notice of Entry of Order Granting Respondent Sunrise Ridge Master Homeowner Association's (the "HOA") and Respondent Nevada Association Services, Inc.'s (the "HOA Trustee") Motion to Dismiss or in the Alternative for Summary Judgment (the "MTD") is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The Notice of Entry of Order granting the MTD was filed on June 3, 2020. JA248. The Notice of Appeal was filed on July 2, 2020. JA253.

(C) The appeal is from a final judgment.

III. NRAP 17 ROUTING STATEMENT

The instant matter should be retained by the Supreme Court of Nevada, because this appeal raises as a principal issue a question of first impression involving the common law and statutory interpretation of application of NRS Chapter 38.310 for claims brought under Chapter 116. NRAP 17(a)(11). The issue presented in this appeal represents a case of first impression in the State of Nevada regarding whether issues of the scope of the duty owed by the HOA and the HOA Trustee of good faith, honesty in fact, observance of reasonable standards of fair dealing, and candor in the

conduct and performance of a homeowners association assessment lien foreclosure sale requires Nevada Real Estate Division ("NRED") mediation prior to litigation. Specifically, whether NRS 38.310(1)(a) and NRS 38.310(2), applies to matter brought concerning NRS 116 duties and obligations of a homeowners association, and its agent, the association's foreclosure trustee, in disclosing a "tender" as defined in *Bank of America N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113 (Nev. 2018) to the bidding public at or before a homeowners association's lien foreclosure sale.

IV. STATEMENT OF ISSUES PRESENTED

Whether the district court erred by granting the HOA and HOA Trustee's MTD on the basis that Saticoy had not completed an NRED mediation pursuant to NRS 38.310 (2) ("a court shall dismiss any civil action which is commenced [without first submitting to NRED].").

V. STATEMENT OF THE CASE

On March 26, 2019, Appellant filed its Complaint. JA001. Appellant's Complaint asserted four claims for relief: (1) intentional, or alternatively, negligent misrepresentation; (2) breach of the duty of good faith; (3) conspiracy; and (4) Violation of NRS 113, *et seq*. *See id*. These claims are related to Saticoy's purchase of real property commonly known as 9720 Hitching Rail, Las Vegas, Nevada 89117 (APN: 163-06-110-095) (the "Property") at a homeowners' association foreclosure conducted by the HOA Trustee on behalf of the HOA. *See id*.

On June 26, 2019, the HOA and HOA Trustee filed MTD. JA020. On September 2, 2019, Appellant filed its Opposition to the MTD. JA091. On October 1, 2019, the HOA and HOA Trustee filed its reply in support of the MTD. JA235. On October 7, 2019, the district court heard oral argument on the MTD and granted the same. JA256-275.

VI. STATEMENT OF RELEVANT FACTS

1. Saticoy is the current owner of real property located at 9720 Hitching Rail, Las Vegas, Nevada 89117 (the "Property"). Appellant acquired title to the Property by foreclosure sale dated February 14, 2014 (the "HOA Foreclosure Sale"), conducted by the HOA Trustee, on behalf of the HOA. JA002 at ¶ 2.

2. The HOA is a Nevada common interest community association or unit owners' association as defined in NRS 116.011. JA002 at ¶ 4.

3. The HOA Trustee is a debt collection agency retained by the HOA as its agent to act as foreclosing trustee. *Id*. at ¶ 5.

4. Under Nevada law, homeowners associations have the right to charge property owners residing within the community assessments to cover the homeowners associations' expenses for maintaining or improving the community, among other things. *Id*. at ¶ 8.

5. When the assessments are not paid, the homeowners association may impose a lien against real property which it governs and thereafter foreclose on such lien. *Id*. at ¶ 9.

6. NRS 116.3116 makes a homeowners association's lien for assessments junior to a first deed of trust beneficiary's secured interest in the Property, with one limited exception; a homeowners association's lien is senior to a deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence

of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2)(c). *Id*. at ¶ 10.

7. On April 25, 2003, the Property was encumbered with a Deed of Trust securing a purchase money loan. JA003 at ¶ 12.

8. The Former Owner of the Property failed to pay to HOA all amounts due pursuant to HOA's governing documents. *Id*. at ¶15.

9. The Deed of Trust was assigned to Bank of America, N.A. ("BANA" or "Lender") on November 8, 2011. JA003 at ¶ 14.

10. Prior to the HOA Foreclosure Sale, on or about December 4, 2013, BANA, through its counsel Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer") contacted the HOA Trustee and requested proof of the superpriority amount of the HOA's lien ("Super-Priority Lien Amount") in an ostensible attempt to pay the same. JA004 at ¶ 18.

11. On January 10, 2014, Miles Bauer provided a payment to the HOA Trustee in the amount of $585.00, which was equivalent to 9-months of assessments or more. JA004 at ¶ 21.

12. The HOA Trustee, on behalf of the HOA, rejected the payment (the "Attempted Payment"). JA004 at ¶ 22.

13. In none of the recorded documents, nor in any other notice recorded with the Clark County Recorder's Office, did the HOA and/or HOA Trustee specify or disclose that any individual or entity, including but not limited to BANA, had attempted to pay any portion of the HOA's lien in advance of the HOA Foreclosure Sale. JA005 at ¶ 27.

14. Saticoy believed that the HOA Foreclosure Sale was conducted properly pursuant to the Recitals in the Foreclosure Deed and that the Deed of Trust was extinguished. JA132.

15. Appellant could not have discovered on its own whether or not the Property was being sold subject to the Deed of Trust without first engaging in a quiet title action against BANA and having BANA disclose the tender after the *SFR Investments* decision by the Nevada Supreme Court. JA006 at ¶ 38.

16. BANA first disclosed to Appellant the Attempted Payment on March 25, 2016 (the "Discovery") in United States District Court, District of Nevada, Case No. 2:16-cv-00660 (the "Case"). JA006 at ¶ 40.

17. In its Opposition to the subject Motion to Dismiss, via undisputed Declaration, Appellant alleged that it was Appellant's practice and procedure when it would attend an NRS Chapter 116 foreclosure to inquire if any sums had been paid or offered to satisfy the superpriority portion of the HOA's lien, and had Appellant

known about the Attempted Payment Appellant would not have bid on the Property. JA132.

18. At all times relevant to this matter, if Mr. Haddad, as the agent of Saticoy, had learned of a "tender" either having been attempted or made, he would not purchase the Property offered in that HOA Foreclosure Sale. *See id*.

19. The Order of Dismissal states as follows, in relevant part:

> (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.

(emphasis added). JA245-46

VII. STANDARD OF REVIEW

This Court reviews de novo a matter decided on the basis of a pure question of law, such as in cases where statutory construction is at issue. *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403 (2009). "[A] complaint should not be dismissed for insufficiency, for failure to state a cause of action, unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim." *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169 (1965) (citation omitted).

VIII. SUMMARY OF ARGUMENT

The district court erred when it granted the HOA and HOA Trustee's MTD as this case is not subject to NRS 38.310's mandatory, pre-litigation mediation.

IX. LEGAL ARGUMENT

A. NRS 38.310(a) IS NOT IMPLICATED

The prohibition of filing a civil action absent a mediation pursuant to NRS 38.310 relates to two (2) types of claims against the HOA. The first type of a "civil action" that must be mediated relates to the "interpretation, application or enforcement of the CC&R's that has nothing to do with the allegations of this Complaint. Nonetheless, the district court held, "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***."

However, as pled, Appellant alleges that the HOA by and through the HOA Trustee as its agent, intentionally or negligently misrepresented at the time of the HOA Foreclosure Sale that no tender of the Super Priority Lien Amount and/or Attempted Payment had occurred. Saticoy's claims do ***not*** require an interpretation of the CC&R's. Instead, the claims require the district court to interpret the statutory and common law mandates pursuant to NRS Chapter 116 concerning Saticoy's misrepresentation claim and NRS 116.1113 claim for good faith and candor in the performance of obligations and its duties. In addition, the district court would be required to determine if NRS 113.130 and NRS Chapter 113 *et seq*. generally mandate that Respondents provide Appellant a Seller's Real Property Disclosure Form. The district court did not need to even review the CC&Rs to adjudicate the claims in this case; thus, the district court's dismissal was erroneous.

The district court cited *McKnight Family, LLP v. Adept Mgmt*., 310 P.3d 555 (Nev. 2013), as controlling in this case. The *McKnight* holding was based upon a lien for delinquent assessments that allegedly was improperly calculated and wrongfully asserted by the HOA and *did* require interpretation of the CC&R's since

it was a dispute "under NRS 116 after a dispute over allegedly unpaid assessments." *Id* at 557. In *McKnight*, the Court noted that "an action is exempt from the NRS 38.310 requirements if the action relates to an individual's right to possess his or her property." *Id* at 558. *McKnight* stated that in *Hamm* the Court "determined that a threat of foreclosure constitutes a danger of irreparable harm because the land is unique." *McKnight* at 558 (citing *Hamm v. Arrowcreek Homeowner's Assn*, 124 Nev. 290, 297(2008)).

In *McKnight*, the claims all emanated from the failure of the unit owner to pay assessments and the homeowner's association's subsequent foreclosure of the Property against a homeowner/member of the association. The negligence claims in *McKnight* concerned the payments Mr. McKnight made to the homeowners' association. *Id.* at 558. Mr. McKnight's breach of contract claims related to the obligations and duties set forth in the homeowners' association's CC&Rs. *Id*. Mr. McKnight and association were parties to the CC&R's and had a contractual relationship. The allegations of the Complaint here do not sound in breach of contract as the alleged misconduct occurred during the HOA Foreclosure Sale, pursuant to violations of statutes.

Mr. McKnight also brought a wrongful foreclosure action based upon the dispute regarding unpaid assessments, but that claim was based upon the

homeowners' association's failure to adhere with the provisions of the CC&Rs, and in that circumstance would be governed by NRS 38.310. *Mcknight* at 559.

For all matters raised in the Complaint here, Appellant was not a party to the CC&Rs until the HOA Foreclosure Sale was completed. The Compliant does not seek damages from Appellant's involvement with the HOA or governing CC&Rs, but to matters leading up to and including the HOA Foreclosure Sale.

The Court is asked in this case to interpret the mandates of NRS 116.1113 and NRS 113.130 and their related sections along with common law to determine if the HOA Trustee, as agent for the HOA, had a duty to third-party bidders at the HOA Foreclosure Sale to disclose any "tender" of the Super Priority Lien Amount and/or Attempted Payment to the HOA Trustee and/or the HOA or their respective obligations to provide the mandated disclosures under NRS 113.130 that would obligate the HOA and HOA Trustee to disclose relevant information to Appellant. NRS 38.310 is not implicated in the allegations of this Complaint. Also of note, NRS 38.310 is simply not applicable to the allegations against the HOA Trustee, but the district court failed to address that issue in its Order of Dismissal. Thus, Appellant is confident that the Supreme Court will reverse the Order of Dismissal.

B. <u>NRS 38.310(b) AND NRS 38.300(3) ARE NOT IMPLICATED</u>

The second type of claim that requires mediation pursuant to NRS 38.310 is

a claim based upon the "procedures used for increasing, decreasing or imposing additional assessments...," which has nothing to do with the claims raised in the Complaint.

Finally, NRS 38.300(3) provides that a "civil action" is not deemed to be an action relating to the title to residential property. The district court did properly hold that "the instant case was not an action related to title of property; therefore, that exception under NRS 38.300(3), would not apply."

X. CONCLUSION

Based upon the foregoing, the district court committed reversible error in multiple ways. Appellant respectfully requests that this Honorable Court reverse the order granting the HOA the HOA Trustee's Motion to Dismiss.

Dated this November 30, 2020.

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

[a.] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

[a.] Proportionately spaced, has a typeface of 14 points or more, and contains 2,463 words; or

[b.] does not exceed 30 pages.

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this November 30, 2020.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on November 30, 2020, I caused a copy of **Appellant's Opening Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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