IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS SUSHI, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
MAISA, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND BLAKELEY TRUST, AND ITS TRUSTEE DAWN GERKE, A/K/A DAWN GERKE BERKENSTOCK,
Respondents.

No. 48475

FILED

JUN 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order, certified as final under NRCP 54(b), dismissing a complaint in a real property matter. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

FACTS

The underlying case arises from respondent Maisa, LLC's construction of a medical office building that allegedly encroaches onto 17.5 feet of land claimed by appellant Las Vegas Sushi, LLC (LVS). LVS brought suit against a number of parties, including Maisa and the previous owners of the pad on which the allegedly offending building was constructed, respondent Blakeley Trust and its trustee Dawn Gerke, aka Dawn Gerke Berkenstock (collectively referred to as the Trust).

According to the district court's docket entries, a co-defendant filed an answer on September 12, 2006, but neither Maisa nor the Trust filed answers to the complaint. Instead, on October 3, 2006, Maisa moved to dismiss and/or for summary judgment on all claims against it. On October 4, 2006, the Trust filed a separate motion to dismiss and/or for

summary judgment on all of LVS's claims against the Trust. LVS filed an opposition to Maisa's motion but not to the Trust's motion. In its opposition to Maisa's motion, LVS stated, "[n]ot wanting to waste the Court's time, Plaintiff agrees to voluntarily dismiss without prejudice Counts I and IV. This is based on Plaintiff's desire to amend the Complaint to remove the negligence causes of action and to bring causes of action for breach of contract."[1] Counts I and IV were the only claims against Maisa and the Trust in LVS's original complaint. As part of its opposition to Maisa's motion, LVS included a countermotion to amend its complaint, but failed to attach the proposed amended complaint to the countermotion to amend as required by EDCR 2.30(a). Both Maisa and the Trust opposed LVS's countermotion to amend.

Without leave of the court or permission from Maisa and the Trust, LVS subsequently filed its "first amended complaint" on October 23, 2006, 20 days after filing its countermotion to amend and one day before the hearing on the countermotion. This amended complaint purported to add a new cause of action for breach of contract against Maisa and the Trust and removed the negligence claim against them that was contained in the original complaint. The amended complaint further purported to

---

[1]In Count I, LVS sought a permanent injunction to remove Maisa's building due to its alleged violation of the covenants, conditions, and restrictions and approved site plan. In Count IV, LVS asserted a negligence claim against Maisa, the Trust, and another co-defendant. Although LVS indicated it wanted to remove the negligence cause of action and bring claims for breach of contract, it nonetheless agreed to voluntarily dismiss Count I's claim for injunctive relief along with Count IV's negligence claim.

retain the injunctive relief claim that LVS had agreed to voluntarily dismiss.

After a hearing, the district court entered an order on October 31, 2006, that granted Maisa's and the Trust's motions and further dismissed, with prejudice, all claims against them. The October 31 order also denied LVS's countermotion to amend its complaint and struck LVS's first amended complaint NRCP 54(b)from the record. In addition, the district court's order, certified as final under NRCP 54(b), dismissed LVS's claims against Maisa and the Trust. LVS moved for reconsideration, but the district court denied that motion. LVS then filed a timely appeal to this court from the October 31 order.

DISCUSSION

On appeal, LVS contends that the district court abused its discretion in denying it leave to amend its complaint. LVS also contends that the district court erred in granting summary judgment in favor of Maisa and the Trust. We disagree, and, based on the reasoning set forth below, we affirm the denial of LVS's motion to amend, the striking of its amended complaint, and the grant of summary judgment on LVS's claims against Maisa and the Trust.

The district court did not abuse its discretion in denying LVS's countermotion to amend and striking LVS's amended complaint

After a responsive pleading has been served, NRCP 15(a) allows a party to amend its pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." A motion to amend a complaint is left to the district court's sound discretion. Stephens v. Southern Nevada Music Co., 89 Nev. 104, 507 P.2d 138 (1973). When a motion to amend is made in the Eighth Judicial District Court, EDCR 2.30(a) provides that "[a] copy of a proposed

amended pleading must be attached to any motion to amend the pleading."

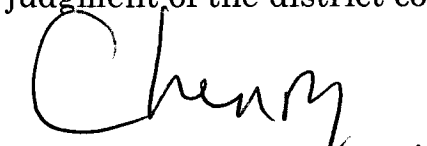
Here, LVS filed its complaint on June 26, 2006, and an answer was filed by a co-defendant on September 12, 2006. Therefore, when Maisa and the Trust filed their motions to dismiss and/or for summary judgment in October, a responsive pleading had already been filed in the case. LVS was thus required by NRCP 15(a) to seek leave of the district court in order to amend its complaint. As noted above, and as the Trust points out, in moving to amend its complaint, LVS failed to attach its proposed amended complaint to its motion as required by EDCR 2.30(a). As a result, based on LVS's failure to comply with EDCR 2.30(a), we conclude that the district court did not abuse its discretion in denying Maisa's October 3, 2006, countermotion to amend its complaint. Moreover, because LVS filed its amended complaint without first obtaining leave to amend or respondents' consent and because LVS's procedurally defective motion to amend was denied after the amended complaint had already been filed, we further conclude that the district court did not abuse its discretion in striking LVS's unapproved amended complaint.

The district court properly dismissed LVS's claims against Maisa and the Trust

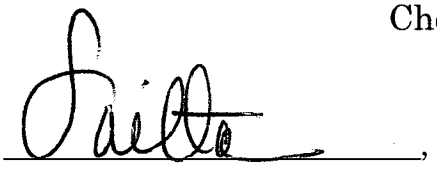
In responding to Maisa's motion to dismiss or for summary judgment, LVS stated that it agreed to voluntarily dismiss Counts I and IV of its original complaint, which were the only claims against Maisa or the Trust. As set forth above, although LVS's decision to voluntarily dismiss these claims was based on its desire to amend the complaint, LVS failed to follow the rules governing the amendment of pleadings and, as a result, its motion to amend was denied and its unauthorized amended

complaint was stricken. LVS did not condition its consent to dismissal on the granting of leave to amend its complaint. Thus, because LVS agreed to voluntarily dismiss these claims, we conclude that the district court properly granted the motions to dismiss. Accordingly, we

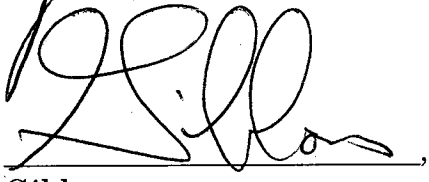
ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. Douglas W. Herndon
Carolyn Worrell, Settlement Judge
Brown Brown & Premsrirut
Harris Merritt Chapman, Ltd.
Meier & Fine, LLC
Eighth District Court Clerk

---

[2]In light of this order, we need not consider the remaining arguments raised by LVS or Maisa in its surreply brief. Additionally, as Maisa did not file a cross-appeal, we will not address its argument that the district court abused its discretion by denying its motion for attorney fees. Finally, having considered Maisa's request for attorney fees on appeal, we conclude that no such award is warranted, and we deny the request.