IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS KITCHEN, LLC, D/B/A MAKINO II LAS VEGAS, MAKINO PREMIUM OUTLET, LLC,
Appellant,
vs.
FAIRWAY RESTAURANT EQUIPMENT CONTRACTING, INC., A FLORIDA CORPORATION,
Respondent.

No. 52032

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a second amended judgment entered in a breach of contract action.[1] Our preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(e) revealed two potential jurisdictional defects. Accordingly, on January 30, 2009, this court entered an order directing appellant to show cause why this appeal should not be dismissed for lack of jurisdiction.

[1]Appellant's notice of appeal indicates that it appeals from an order denying a motion to alter or amend. However, appellant clarifies in his response that he challenges only the district court's February 28, 2008, second amended judgment.

09-11066

First, our order noted that orders denying motions to alter or amend are not substantively appealable. See NRAP 3A(b); Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984). However, as explained above, appellant challenges only the second amended judgment. Thus, this issue is now moot.

Second, our order noted that it appeared that respondent's claims for unjust enrichment and claim and delivery, and appellant's counterclaims for breach of the implied covenant of good faith and fair dealing, fraud, abuse of process, breach of warranty, breach of implied warranty of fitness, and breach of implied warranty of merchantability remained pending below. See Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000) (explaining that an order that resolves less than all of the claims or the rights and liabilities of all the parties in an action is generally not appealable as a final judgment).

Appellant has now filed a response to our order to show cause, and respondent has filed a reply. Both parties make essentially the same argument in determining that all claims have been resolved. Specifically, they reason as follows. If a motion for judgment as a matter of law made at the close of all evidence is denied, the court is considered to have submitted the action to the jury, subject to the court's later deciding any

legal questions raised in the motion.[2] NRCP 50(b). In this case, prior to the submission of the case to the jury, respondent made an oral motion for judgment as a matter of law, which was denied. Thus, all questions of fact (all claims except the claim and delivery and unjust enrichment) were submitted to the jury. When the district court entered its judgment on jury verdict, all factual claims were disposed of. The remaining claims for claim and delivery and unjust enrichment were abandoned.

The parties' argument is without merit. Although all factual claims may have been submitted to the jury, the jury verdict forms do not address any of the claims identified above. Thus, neither the judgment on jury verdict, amended judgment on jury verdict, nor the second amended judgment on jury verdict can be said to resolve these claims. In the absence of a written judgment disposing of these claims, there is no final judgment. See id.; Rust v. Clark Cty. School District, 103 Nev. 686, 747 P.2d 1380 (1987).

Moreover, this court has held that in order to constitute a final judgment, all claims must be formally resolved by order of the district court, including claims that a party has abandoned. KDI Sylvan Pools v.

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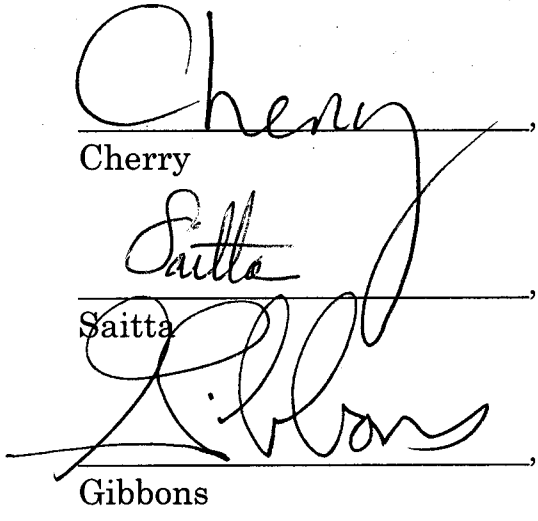
[2]It is unclear from the documents provided to this court whether the motion for judgment as a matter of law was in fact made at the close of all evidence. However, for purposes of determining jurisdiction we assume that it was.

Workman, 107 Nev. 340, 810 P.2d 1217 (1991). Thus, assuming *arguendo* that the judgments on jury verdict finally disposed of all fact based claims, the absence of a written order disposing of the causes of action for claim and delivery and unjust enrichment separately precludes any contention that a final judgment has been entered.

Based on the foregoing, we conclude that no final judgment has been entered. We therefore lack jurisdiction over this appeal, and we ORDER this appeal DISMISSED.[3]



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

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[3]The clerk shall return, unfiled, the opening brief and appendix received on January 30, 2009. This dismissal is without prejudice to the right of any aggrieved party to file a notice of appeal from a valid final judgment. See NRAP 3A.

cc: Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
Phillip Aurbach, Settlement Judge
Kajioka & Associates
Kolesar & Leatham, Chtd.
Eighth District Court Clerk