IN THE SUPREME COURT OF THE STATE OF NEVADA

SEDONA CONDOMINIUM HOMEOWNERS ASSOCIATION, INC., A NEVADA NON-PROFIT CORPORATION,
Appellant,
vs.
CAMDEN DEVELOPMENT, INC., A DELAWARE CORPORATION; OASIS RESIDENTIAL, INC., A NEVADA CORPORATION; AND CAMDEN SUBSIDIARY II, INC., A TEXAS CORPORATION,
Respondents.

No. 57052

FILED

DEC 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order, certified as final under NRCP 54(b), granting a motion to dismiss in a real property action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant Sedona Condominium Homeowners Association, Inc., governs a condominium development in Las Vegas called the Sedona Condominiums. Respondents Oasis Residential, Inc., and Camden Subsidiary II, Inc., originally owned the land where the Sedona Condominiums are now located. Delta Harbor Development purchased the land and contracted with respondent Camden Development, Inc., to construct an apartment complex, known as the Phase II units, on the undeveloped portion of the land. Delta Harbor Development rented out the majority of the Phase II units as apartments and later sold them to Eagle Las Vegas 560, LLC. Eagle converted the Phase II units into the Sedona Condominiums and began selling them to the public in June of 2005.

In 2006, Sedona filed a complaint against Camden Development, Camden Subsidiary II (collectively, the Camden Parties), Oasis, and others, alleging various claims, including NRS Chapter 40 construction defect claims and breach of the implied warranty of habitability. The district court later granted the Camden Parties' and Oasis's motion for declaratory judgment, stating that NRS Chapter 40 did not apply to the Camden Parties or Oasis. Following this declaratory judgment, the district court dismissed Sedona's remaining claims against the Camden Parties and Oasis based on the economic loss doctrine and lack of privity. Sedona now appeals.

We conclude that Sedona waived its NRS Chapter 40 claims against the Camden Parties and Oasis by failing to maintain these arguments before the district court. We further conclude that the district court properly dismissed Sedona's breach of the implied warranty of habitability claim against the Camden Parties and Oasis because no vertical privity exists between Sedona and the Camden Parties and Oasis, and the appellate record indicates Camden Parties and Oasis are not builder-vendors of new dwellings.[1]

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[1]The Camden Parties and Oasis question whether this court has jurisdiction over this appeal, because the district court certified its original order as final under NRCP 54(b), but not its amended order. We conclude that this court has jurisdiction to hear this appeal because the amended order did not substantively change the original order. See Morrell v. Edwards, 98 Nev. 91, 92, 640 P.2d 1322, 1324 (1982) ("[W]hether an appeal is properly taken from an amended judgment rather than the judgment originally entered depends upon whether the amendment disturbed or revised legal rights and obligations which the prior judgment had plainly and properly settled with finality.").

The parties are familiar with the facts and procedural history of this case, and we do not recount them further except as necessary for our disposition.

We review de novo an order granting an NRCP 12(b)(5) motion to dismiss. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision dismissing a complaint pursuant to NRCP 12(b)(5) is rigorously reviewed on appeal, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. Id. Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." Id. at 228, 181 P.3d at 672. We review all legal conclusions de novo. Id.

Sedona waived its NRS Chapter 40 claims against the Camden Parties and Oasis

Though the parties contest the meaning and applicability of Westpark Owners' Ass'n v. Dist. Ct., 123 Nev. 349, 167 P.3d 421 (2007), we need not reach that issue. We disagree with Sedona that it continued to assert NRS Chapter 40 claims against the Camden Parties and Oasis after the district court entered a declaratory judgment stating that NRS Chapter 40 was inapplicable to the Camden Parties and Oasis.

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Sedona conceded the inapplicability of NRS Chapter 40 to the Camden Parties and Oasis in its non-opposition to the second motion for declaratory judgment, during the hearing on this motion, and in its second amended complaint. Further, Sedona's opposition to the Camden Parties and Oasis' motion to dismiss expressly stated that even if a residence is not a "new" residence under NRS Chapter 40, it could still

bring other statutory and common law claims against the Camden Parties and Oasis. Therefore, we conclude that Sedona waived its NRS Chapter 40 arguments by conceding that the statute did not apply to the Camden Parties and Oasis and failing to raise the issue in its second amended complaint or its opposition to the motion to dismiss. Consequently, the district court did not err in treating Sedona's claims as seeking economic relief for negligence and dismissing them pursuant to the economic loss doctrine. Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000), overruled in part by Olson v. Richard, 120 Nev. 240, 89 P.3d 31 (2004).

The district court properly dismissed Sedona's breach of the implied warranty of habitability claim

We disagree with Sedona that the district court improperly dismissed its breach of the implied warranty of habitability claim based on a lack of privity and the fact that the Camden Parties and Oasis are not builder-vendors of a new dwelling.

We adopted the implied warranty of habitability in Radaker v. Scott, 109 Nev. 653, 855 P.2d 1037 (1993). In order to claim breach of the implied warranty of habitability, a plaintiff must demonstrate that he or she purchased a new dwelling from the defendant. See id. at 660; 855 P.2d at 1042. A plaintiff must also show that the defendant is the builder-vendor of the new dwelling. See id. at 660-61; 855 P.2d at 1042.[2]

Sedona's members did not purchase the Phase II units from either the Camden Parties or Oasis. Instead, Sedona's members purchased the Phase II units from Eagle. Therefore, no contract existed between Sedona and Camden Parties and Oasis and no vertical privity

[2]Sedona asks us to expand the implied warranty of habitability to builder-venders of apartment complexes. We decline to do so at this time.

existed between these parties. See id. at 656, 855 P.2d at 1039 (applying implied warranty of habitability to vendor of home who had vertical privity with the buyer and when builder was only liable as joint venturer).

The Camden Parties and Oasis also cannot be builder-vendors of a new dwelling. See id. at 661, 855 P.2d at 1042 (applying implied warranty of habitability to builder-vendor of new home). Oasis and Camden Subsidiary II never owned the property when the Phase II units existed. Furthermore, Camden Development constructed the Phase II units as apartments, not condominiums. See Frickel v. Sunnyside Enterprises, Inc., 725 P.2d 422, 424-25 (Wash. 1986) (refusing to apply the implied warranty of habitability partly because builder-vendor of an apartment complex did not construct the apartments for the purpose of resale). Delta Harbor Development then sold the Phase II units to Eagle, which eventually converted them to condominiums and sold them to the public. Thus, we conclude that the district court properly dismissed Sedona's breach of the implied warranty of habitability claim against the Camden Parties and Oasis. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Susan Johnson, District Judge
Angius & Terry LLP/Las Vegas
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk