

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAFAEL ARCENAS, AS AN
INDIVIDUAL; AND FLORINA
ARCENAS, AS AN INDIVIDUAL,
Appellants,

vs.

MORTGAGEIT, INC.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., A FOREIGN
CORPORATION; US BANK NATIONAL
ASSOCIATION, AS TRUSTEE FOR
CREDIT SUISSE FIRST BOSTON
MORTGAGE SECURITIES CORP.;
CSAB MORTGAGE-BACKED PASS-
THROUGH CERTIFICATES 2006-1;
AND WELLS FARGO BANK, N.A.,
Respondents.

No. 68178

FILED

JUL 13 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Hendrich*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a real property action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellants Rafael and Florina Arcenas sued respondents based on their involvement in the origination and transfer of the note and deed of trust on the Arcenas' property, and in initiating a non-judicial foreclosure against the Arcenas. Their claims were based on allegations that respondents fraudulently induced them to sign a second set of loan documents which differed from the original loan documents, which they maintained caused the later transfers of the loan and property to also be fraudulent. Respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motion and dismissed the complaint without prejudice—over the Arcenas' opposition and request to file an amended complaint—finding

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that the claims were all based on fraud allegations, but were not pleaded with the requisite particularity under NRCP 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”). The district court also denied the Arcenas’ later motion for reconsideration. This appeal followed.

The district court’s dismissal of the complaint

A decision to dismiss a complaint under 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 plaintiff.¹ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). 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. Claims sounding in fraud, however, have a heightened pleading standard. NRCP 9(b). Pursuant to NRCP 9(b), fraud claims must be plead with particularity as to “the time, the place, the identity of the parties involved, and the nature of the fraud” to avoid dismissal for failure to state a claim. *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981). We review legal conclusions de novo. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Below, the Arcenas raised claims of promissory estoppel and violations of Nevada’s Deceptive Trade Practices Act against respondent

¹The parties submitted documents outside the pleadings to support their motions and opposition, but the district court did not consider these documents in making its decision. Thus, we review the order as one for dismissal and not one granting summary judgment. See *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (providing that “[a]lthough documents outside the pleadings were presented to the district court, the district court did not rely on these documents in its ruling,” and thus concluding that the order was properly reviewed on appeal as an NRCP 12(b)(5) dismissal).

MortgageIT, Inc., based on their allegations that MortgageIT fraudulently represented that the second set of mortgage documents were the same as the first set and had the Arcenas sign the second set of documents under that false pretense. The Arcenas raised further claims of slander of title, quiet title, and wrongful foreclosure against all respondents based on this alleged fraud. On appeal, the Arcenas challenge the district court's conclusion that they failed to plead all of these claims with the requisite particularity.²

In response, MortgageIT relies on federal caselaw to assert that, because the Arcenas did not identify a specific person that committed the fraud, the district court properly dismissed the claim for lack of particularity. *See, e.g., Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1127 (N.D. Cal. 2009) (recognizing that, under the federal equivalent to NRCP 9(b), a plaintiff suing a corporation under a fraud theory must allege the name of the specific person that made the fraudulent representations); *see also Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that cases interpreting the federal counterparts to the Nevada Rules of Civil Procedure are strong persuasive authority because the Nevada rules are based in large part on the federal rules).

Although the Arcenas filed a reply brief, that brief only addresses the denials of the request to amend the complaint and the motion for reconsideration. The Arcenas present no arguments or legal authority to rebut the contention that their claims fail because they do not identify the specific person that allegedly made the fraudulent statement.

²The Arcenas do not challenge the district court's conclusion that all of their claims are subject to NRCP 9(b)'s heightened pleading standards, and thus, we do not address that issue.

By failing to oppose this argument, which appears to have merit and was supported by salient authority, we conclude that the Arcenas have conceded the issue.³ See *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellant's opening brief, and appellant also declined to address the argument in the reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position"). While the other respondents did not raise this issue, because all of the Arcenas' claims sound in fraud, and because they failed to rebut MortgageIT's argument at all in this regard, we find it equally applicable to all of the claims for relief in the complaint. Accordingly, we conclude the district court properly dismissed the claims for promissory estoppel, violations of Nevada's Deceptive Trade Practices Act, slander of title, quiet title, and wrongful foreclosure.⁴ See *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

³The Arcenas never argued, in the district court or on appeal, that they do not know the identity of the person or persons who allegedly made the fraudulent statements. Indeed, in the proposed amended complaint attached to their motion for reconsideration, the Arcenas averred that a broker that made at least some of the fraudulent statements was the "primary person of contact" for their loan, without providing any reason for not specifically identifying the person or stating that they did not know the name of the person. While the Arcenas do argue on appeal that certain information regarding fraud could not have been pleaded with specificity because the information was only in respondents' possession, they did not extend that argument to the identity of the person or persons that made the allegedly fraudulent statements.

⁴Based on our decision, we need not address the district court's alternative grounds for dismissing the complaint and the Arcenas' arguments regarding those additional grounds.

As set forth in the complaint, the Arcenas' remaining claims for declaratory, preliminary injunctive, and permanent injunctive relief were all predicated on the alleged fraud perpetrated by respondents. Because we conclude that the district court properly determined that the Arcenas failed to state any claims based on fraud, these derivative claims were properly dismissed as well. *See Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996) (providing that declaratory relief is only available when there is a justiciable controversy between the parties); *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) ("The existence of a right violated is a prerequisite to the granting of an injunction. Accordingly, an injunction will not issue to restrain an act which does not give rise to a cause of action." (internal quotation marks and citation omitted)).

The district court's denial of leave to amend the complaint

In addition to challenging the dismissal of their complaint, the Arcenas also argue that the district court abused its discretion when it denied their request to amend the complaint. We disagree, as the Arcenas failed to attach the required proposed amended complaint to their single-sentence request for leave to amend, which was included in their opposition to the motions to dismiss.⁵ *See* EDCR 2.30(a) ("A copy of a proposed amended pleading must be attached to any motion to amend the pleading."); *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (explaining that this court reviews the denial of a motion for leave to amend a complaint for an abuse of discretion). Therefore, we

⁵The Arcenas did attach a proposed amended complaint to their later motion for reconsideration, but, as discussed below, they failed to provide an adequate record for this court to be able to consider their challenge to that order.

conclude that the district court did not abuse its discretion in denying the request to amend the complaint.⁶


The district court's denial of the motion for reconsideration

Finally, the Arcenas purport to challenge the denial of their motion for reconsideration following the dismissal of their complaint and denial of their request to amend.⁷ The Arcenas failed, however, to provide this court with copies of respondents' oppositions to the reconsideration motion. As it is appellants' duty to provide this court with an adequate record on appeal, *see* NRAP 30(b)(3) (stating that appellant must provide any portion of the record which is "essential to [the] determination of issues raised in [the] appeal"), "we necessarily presume that the missing portion supports the district court's decision" to deny reconsideration. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131,


⁶The Arcenas also argue that they could not have presented a proposed amended complaint with their initial request because, until the district court determined whether the complaint failed to state any claims, they would not have known any amendment was needed. Because this argument was not presented to the district court, either with their request to amend or with their motion for reconsideration, we decline to consider it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("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.").

⁷Because the motion for reconsideration was filed within ten days of the notice of entry of the order dismissing the Arcenas' complaint and sought a substantive change to that order, we may treat it as an NRCP 59(e) motion to alter or amend the judgment. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010) (providing that if a reconsideration motion is timely filed in writing and seeks to substantively alter the judgment, it should be given NRCP 59(e) status).


135 (2007). Accordingly, we affirm the denial of reconsideration.
Based on the foregoing, we affirm the district court.
It is so ORDERED.



Gibbons C.J.



Tao J.



Silver J.

cc: Hon. Linda Marie Bell, District Judge
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