IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONEY E. LOPEZ,
Appellant,
vs.
ONE REVERSE MORTAGE, LLC,
Respondent.

No. 77084-COA

ORDER AFFIRMING IN PART AND REVERSING IN PART

Toney E. Lopez appeals a district court order dismissing his complaint with prejudice. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Lopez owns a home in Las Vegas subject to a reverse mortgage. On September 27, 2017, Raymond Kangas, an agent for One Reverse Mortgage, LLC (ORM), contacted Lopez about refinancing the reverse mortgage. The Federal Housing Administration guidelines for reverse mortgages were changing on October 2, 2017, however, and in order for Lopez to refinance under the prior guidelines, Lopez needed to complete his loan materials and submit them to Kangas by September 29, 2017. Kangas told Lopez that if Lopez completed the application, Kangas would file his application prior to the deadline. Lopez completed the materials and submitted them on September 29. Kangas submitted the materials to underwriting, but the underwriter rejected them because the package was incomplete: Kangas—allegedly without exercising due care—had failed to include Lopez's credit report in the application. On October 2, 2017, Kangas discovered the error, and also that Lopez's credit was frozen, and concluded it was too late to comply with the application procedure.

Lopez sued ORM for negligence and a claim he called "lack of experience," claiming that ORM's failure to obtain, or to know how to file the application without the credit report caused him to lose $20,000 of his home

equity. ORM filed a motion to dismiss under NRCP 12(b)(5). The district court concluded that lenders do not owe a duty of care to borrowers and dismissed Lopez's complaint with prejudice. The court relied on a federal case holding that lenders do not owe a duty to borrowers, which was based on a California law. The district court also concluded that the other elements of negligence were not alleged or supported by factual assertions.

On appeal, Lopez argues that the district court erred when it concluded that lenders do not owe a duty to borrowers and when it dismissed his complaint with prejudice.[1] After both parties submitted their briefs for this appeal, this court issued an order requesting supplemental briefing regarding the application of Nevada's economic loss doctrine.

Whether the district court erred when it dismissed Lopez's negligence claim

Lopez argues that the district court erred when it concluded that lenders do not owe a duty of care to borrowers. The district court relied on *Larson v. Homecomings Financial, LLC*, 680 F. Supp. 2d 1230, 1235 (D. Nev. 2009), a federal case in which the court used California law to conclude the lender did not owe a borrower a duty of care under Nevada law. We decline to adopt the federal court's rationale and instead apply Nevada's economic loss doctrine.[2]

In Nevada, negligence actions usually cannot be maintained when the plaintiff only claims economic damages. *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 74, 206 P.3d 81, 87 (2009) ("[U]nless there is personal injury or property damage, a plaintiff may not

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[1]Lopez does not challenge the dismissal of the "lack of experience" claim on appeal.

[2]Appellate courts "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

recover in negligence for economic losses."). "The economic loss doctrine draws a legal line between contract and tort liability that forbids tort compensation for 'certain types of foreseeable, negligently caused, financial injury.'" *Id.* at 75, 206 P.3d at 87. The doctrine encourages plaintiffs to seek remedies under contract law, rather than tort law, "when economic loss occurs as a result of negligence in the context of commercial activity . . . ." *Id.* "Purely economic loss has been defined as the loss of the benefit of the user's bargain . . . including . . . *pecuniary damage for inadequate value* . . . ." *Id.* at 69, 206 P.3d at 83 (emphasis added) (internal quotations omitted).

Here, Lopez asserts that his damages stem from not being able to access his $20,000 in home equity through the reverse mortgage. He asserts no physical injury or damage to his property. Thus, his alleged damages are economic only and his negligence claim must be dismissed.[3] *See Terracon*, 125 Nev. at 69, 206 P.3d at 83.[4]

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[3]In his supplemental briefing, Lopez argues that negligent misrepresentation is an exception under the economic loss doctrine. However, negligent misrepresentation is a distinct cause of action with different elements than general negligence. *Compare Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009) (explaining the elements of general negligence), *with Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (explaining the legal test for negligent misrepresentation). Here, Lopez's complaint asserted only a general negligence claim. Thus, because negligent misrepresentation was not pleaded or argued below, we decline to determine whether the exception applies in this circumstance. *See Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 693 n.3, 290 P.3d 249, 252 n.3 (2012) ("A party may not raise 'new issues, factual and legal, that were not presented to the district court . . . that neither [the opposing party] nor the district court had the opportunity to address.'" (quoting *Schuck v. Signature Flight Support*, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010))).

[4]In light of our disposition, we do not address ORM's argument that Lopez waived his negligence claim on appeal.

Whether the district court erred when it dismissed Lopez's complaint with prejudice

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo.[5] *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal; courts presume all alleged facts in the complaint are true and draw all inferences in favor of the plaintiff. *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; *see also Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169, 400 P.2d 621, 624 (1965) (noting that a dismissal with prejudice under Rule 12 can be a judgment on the merits and thus, a dismissal for failure to state a claim should only be granted if it appears certain a plaintiff cannot obtain any relief under any set of facts).

Also, Nevada is a notice-pleading state where plaintiffs only need to state facts that give adequate notice of the claim to the adverse party:

> [O]ur [district] courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. A complaint must set forth sufficient facts to establish all necessary elements of a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief sought.

Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted). This standard "requires plaintiffs to set forth the facts which

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[5]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the amendments do not affect our disposition, we cite the current version of the rules herein.

support a legal theory, but does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (footnote omitted) ("A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading."). Further, a court should not dismiss a claim with prejudice unless it finds that leave to amend would be futile. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Ct. App. 2015) ("[L]eave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile.' A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCP 12(b)(5) . . . ." (internal citations omitted)).

Here, Lopez's negligence claim asserts only economic losses and therefore the district court correctly dismissed it. However, the facts alleged in his complaint could support other potential causes of action that cannot be dismissed.

The district court recognized, at the hearing on the motion to dismiss, that there could be a potential breach of contract claim. The written contract, attached as an exhibit to the motion to the dismiss,[6] contains a "No

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[6]Courts may consider documents and transcripts outside of the pleading:

> As a general rule, the court may not consider matters outside the pleading being attacked. However, the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.

Guaranties" provision which states that ORM does not guarantee a loan would be granted or that the loan would close within 120 days from the "Assignment Date." However, Lopez argued at the hearing that Kangas told him that, if Lopez completed the application prior to the deadline, Kangas would file the application immediately. Thus, Kangas and Lopez may have had an additional agreement outside of, or supplementary to, the written contract. Furthermore, it is unclear if the "No Guaranties" provision supersedes Kangas's representations that he would file the application prior to the deadline.[7] Thus, because there are additional facts that Lopez could plead that might warrant relief, and all facts are construed in Lopez's favor, the district court erred when it dismissed Lopez's complaint with prejudice.

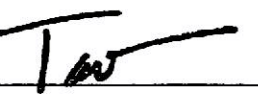
Breliant v. Preferred Equities Corp., 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (citations omitted). A party may seek leave to amend during a hearing, *see Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003), and leave to amend should be freely granted, NRCP 15(a)(2); *see also Nutton*, 131 Nev. at 289, 357 P.3d at 973. While Lopez did not explicitly ask for leave to amend, the district court understood that additional claims might be available based on Lopez's arguments at the hearing while appearing pro se. *See* NCJC 2.2 comment 4 ("[A] judge [can] make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.").

[7]While an oral agreement preceding a written contract may be barred by parol evidence, "a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol [evidence]." *Crow-Spieker No. 23 v. Robinson*, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981) (quoting *Alexander v. Simmons*, 90 Nev. 23, 24, 518 P.2d 160, 161 (1974)). Furthermore, any ambiguities in a contract should be construed against the drafter. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007). Whether the oral agreement is barred by parol evidence, however, is not an issue here on appeal and should be decided first by the district court.

In sum, we affirm the district court's order dismissing the "lack of experience" and negligence claims. However, we reverse the district court's decision to dismiss the complaint with prejudice. Accordingly, we

ORDER the district court's order AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kenneth C. Cory, District Judge
Holley, Driggs, Walch, Fine, Puzey, Stein, Thompson/Las Vegas
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Eighth District Court Clerk