

IN THE SUPREME COURT OF THE STATE OF NEVADA

XINXING WANG; XUAN XU; YAN ZHANG; XIAOCHU LIU; AND XIN RONG, DERIVATIVELY ON BEHALF OF DOWNTOWN3RD DEVELOPMENT FUND, LLLP,

Appellants,

vs.


CIM GROUP, L.P.; DT3 MANAGER, LLC; LVLA LOAN MANAGER, LLC; LAS VEGAS ECONOMIC IMPACT REGIONAL CENTER, LLC; AND PACIFIC WESTERN BANK,

Respondents.

No. 85025

FILED

AUG 14 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a final judgment granting motions to dismiss a contract and tort action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

This case is about the subordination of a secured loan not yet due. Appellants Xinxing Wang, Xuan Xu, Yan Zhang, Xiaochu Liu, and Xin Rong (collectively “Limited Partners”) are among the 195 investors and limited partners of Downtown3rd Development Fund, LLLP (“EB-5 Lender”). Respondents CIM Group, L.P., DT3 Manager, LLC, LVLA Loan Manager, LLC, (collectively “Developer Group”) formed the EB-5 Lender to fund a project to redevelop and reopen the former Lady Luck Hotel & Casino and surrounding property in Las Vegas as the Downtown Grand Hotel. Las Vegas Economic Impact Regional Center, LLC, is the general partner of EB-5 Lender.

The initial development plan for the Downtown Grand Hotel called for renovating two hotel towers. EB-5 Lender loaned DT3 Manager the funds to develop these two towers, which was secured in significant part by the property that made up the Downtown Grand Hotel. Developer Group then sought to build a third guest tower because the project had not yet reached profitability. Developer Group secured a loan in the amount of \$82,000,000 from respondent Pacific Western Bank to build this third guest tower. In addition to the loan agreement with DT3 Manager, Pacific Western Bank also entered into a subordination agreement with EB-5 Lender, which subordinated EB-5 Lender's original loan to Pacific Western Bank's loan.

Limited Partners filed a derivative lawsuit on behalf of EB-5 Lender related to the subordination of EB-5 Lender's original loan to Pacific Western Bank's loan. In their verified amended complaint, Limited Partners asserted 12 tort and contract claims. Limited Partners alleged that EB-5 Lender suffered harm in the form of (1) the impairment of its lien and the collateral securing the loan, (2) the loss of first lien priority, (3) a diminution of the value of the collateral securing the loan, and (4) becoming an undersecured creditor. Developer Group, Las Vegas Economic Impact Regional Center LLC, and Pacific Western Bank all moved to dismiss. All respondents argued that Limited Partners lacked standing to bring the action because none of the claims were ripe, since neither loan was due or in default and therefore any alleged harm was speculative, hypothetical, and unlikely to occur in the future. Pacific Western Bank attached appraisals of the collateral to its motion to dismiss.

At the hearing on the motions to dismiss, Pacific Western Bank noted that it should not have attached the appraisals to its motions to dismiss. However, it did not withdraw them from the district court's consideration. Rather, the record shows that, during the hearing, the district court referenced the appraisals, stating "I love a good real estate appraisal." "[i]t does appear as though the -- the loan is oversecured at this point," and "I just don't see where there's been an actual damage based upon the subordination here, based upon the numbers I saw." Subsequently, the district court granted all three motions to dismiss, finding that Limited Partners failed to allege sufficient facts supporting that EB-5 Lender had suffered the harm needed to satisfy Nevada's ripeness doctrine because neither loan was in default and the EB-5 Loan was oversecured. The district court came to this decision, in part, because Limited Partners had not alleged, or demonstrated that they could allege, that the value of the collateral securing both their and Pacific Western Bank's loan had been diminished. Further, the district court found that the defects in Limited Partners' complaint were fatal and could not be cured by amendment absent a triggering event. Limited Partners appeal.

The district court erred by considering the appraisals at the motion to dismiss stage

Limited Partners argue the district court improperly relied on matters outside of the pleadings when it considered the appraisals in granting the motions to dismiss. They contend that the only way the district court could determine that the EB-5 Loan was oversecured or that there was no damage is through the appraisals. In addition to countering on the merits, Las Vegas Economic Impact Regional Center and Pacific Western

Bank assert waiver and invited error. The record does not reveal either. In its opposition to Pacific Western Bank's motion to dismiss, Limited Partners explicitly objected to the appraisals being considered in the NRCP 12(b)(5) context. Thus, the issue was neither waived nor the error invited.

We review dismissals under NRCP 12(b)(5) de novo, accepting the complaint's factual allegations as true and construing all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is warranted only "if it appears beyond a doubt" that the plaintiff can prove no set of facts that, if true, would entitle the plaintiff to relief. *Id.* at 228, 181 P.3d at 672. Generally, the district court is confined to considering only the pleadings on a motion to dismiss, unless the complaint necessarily relied on the evidence not attached to the complaint. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (citing 5A Charles A. Wright & Arthur R. Miller, *Fed. Prac. and Proc. Civ.* § 1356 (2d ed. 1990) (discussing the federal counterpart to NRCP 12(b)(5)); see also *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) ("A court 'may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document.'") (quoting *United States v. Corinthian Coll.*, 655 F.3d 984, 999 (9th Cir. 2011)). Should a district court consider matters outside of the pleadings upon which the complaint does not necessarily rely, it must treat the motion to dismiss as one for summary judgment and provide the parties a reasonable opportunity to present all material pertinent to a motion for summary judgment. NRCP 12(d); 5C Charles A. Wright & Arthur R. Miller,

Fed. Prac. and Proc. Civ. § 1366 (3d ed. 2024) (stating that a motion to dismiss for failure to state a claim should be converted to a motion for summary judgment “whenever matters outside the pleading are presented to and accepted by the court”).

Because the district court considered the appraisals attached to Pacific Western Bank’s motion to dismiss, it was required by NRCP 12(d) to treat the motion to dismiss as a motion for summary judgment, with the attendant protections and notice afforded by the latter. The district court’s comments during the hearing reveal that it not only reviewed the appraisals, but also that it considered them in granting the motions to dismiss. Indeed, the district court’s finding of no harm was informed by the numbers it reviewed in the appraisals. While respondents interpret *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.3d 1380, 1382 (1987), to constrain appellate review of this issue to statements in the written order, their reliance is misplaced here. *Rust* involved the appealability of a district court’s oral pronouncements alone, which this court concluded could not be appealed. *Id.* That rule is inapplicable here because Limited Partners are appealing the district court’s written orders, which are appealable, and the district court’s oral statements during the hearing merely inform our analysis. Beyond that, the district court’s written order states it “considered all of the pleadings and papers filed herein, including the Motion, Opposition, Reply, and briefing on the other motions.” Under these facts, it was incumbent upon the district court to treat the motion as one for summary judgment because it considered the appraisals in finding Limited Partners failed to allege a ripe or cognizable harm. See *Wynn v. Associated Press*, 136 Nev. 611, 613, 475 P.3d 44, 47 (2020) (“When the district court

considers matters outside the pleadings in resolving a motion to dismiss, it effectively treats the motion as one for summary judgment and must apply the summary judgment standard.”).

Limited Partners’ allegation that they were undersecured as a result of the subordination is a sufficient injury to survive a motion to dismiss

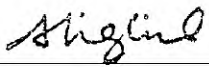
“Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief[, and] litigated matters must present an existing controversy, not merely the prospect of a future problem.” *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986); see also *Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006) (concluding a plaintiff has not suffered a harm where the alleged injury is hypothetical or speculative). To allege facts sufficient to state a cause of action, Limited Partners needed to “affirmatively plead there has been an impairment in the value of their security interest.” *Baldwin v. Marina City Properties*, 145 Cal.Rptr. 406, 412 (Ct. App. 1978). This court, in *First Western Financial Corporation v. Vegas Continental*, reversed a district court’s dismissal with prejudice, determining that a mortgagee or trust deed holder may be able to enforce an assignment clause “to the extent that its security interest has been impaired, by demonstrating that the margin of security, or ratio of the property securing the debt to the amount of debt remaining, is decreased by condemnation.” 100 Nev. 710, 712, 692 P.2d 1279, 1281 (1984). We also rejected the argument that the security interest there had not been impaired because the amount of debt that remained was exceeded by the value of the remaining property after a portion of the property was condemned. *Id.*

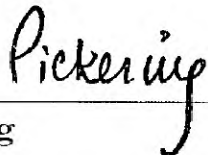
To the extent the district court concluded both that Limited Partners' claim was not ripe and that they failed to allege cognizable damages, we also reverse. Here, Limited Partners alleged (1) they were "currently undersecured (e.g. the Collateral that secures the EB-5 Loan is not sufficient to fully satisfy the EB-5 Loan)"; (2) they were harmed as a result of the "impairment of [their] lien and the impairment of the Collateral that secures the EB-5 Loan"; and (3) they were harmed as a result of a "diminution in the value of the Collateral that secured the EB-5 Loan." Further, Limited Partners alleged that the amendment to their lender agreement, which permitted the subordination of their loan, was harmful to EB-5 Lender and done without consideration. Noting that neither loan was in default, the district court found Limited Partners' alleged harms were speculative and contingent on future events.

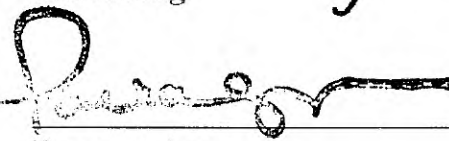
Although the district court did not misread the fact allegations, its application of the law misses the mark. Limited Partners sufficiently alleged that the collateral securing the EB-5 loan was not sufficient to fully satisfy the loan; accepting the complaint's factual allegations as true and construing all inferences in Limited Partners' favor, Limited Partners pleaded an existing injury ripe for judicial review because they alleged the subordination of their loan diminished the value of the collateral. This diminution occurred regardless of whether the loans were due or in default and therefore survives a motion to dismiss. Whether Limited Partners can demonstrate that the collateral's value in fact diminished or that any diminution gives rise to damages under the applicable agreements are issues reserved for subsequent proceedings in the case and not resolvable based on the verified amended complaint alone.

We have considered the remaining arguments and conclude that they are without merit or that we need not reach them in view of the foregoing. Accordingly we,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Stiglich


_____, J.
Pickering


_____, J.
Parraguirre

cc: Hon. Nancy L. Alf, District Judge
Stephen E. Haberfeld, Settlement Judge
Reid & Wise LLC/NY
Marquis Aurbach Chtd.
Holland & Hart LLP/Las Vegas
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Snell & Wilmer, LLP/Las Vegas
Lewis Roca Rothgerber Christie LLP/Las Vegas
Andersen & Beede
Eighth District Court Clerk