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Summary of Pankopf v. Peterson, 124 Nev. Adv. Op. 4

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Pankopf v. Peterson, 124 Nev. Adv. Op. 4 (Feb. 7, 2008)¹

PROPERTY – CONSTRUCTIONAL DEFECTS

Summary

Appeal from a district court order dismissing, without prejudice, appellant’s amended complaint for failure to state a claim under NRCP 12(b)(5) to determine whether claims fall within the purview of NRS Chapter 40.

Disposition/Outcome

Reversed and remanded. The Nevada Supreme Court held that NRS Chapter 40 does not apply to completed blueprints for unfinished residences. Therefore, the district court should not have applied NRS 40.616 and NRS 40.605(1) to the Pankopfs’ claims.

Factual and Procedural History

Appellants Tory and Patricia Pankopf entered into a contract with respondent Michael Peterson to have Peterson draw up blueprints for their personal residence. They began the excavation process but stopped because Peterson’s plans contained numerous design defects, mistakes, omissions, and inaccuracies that prevented them from constructing the residence.

The Pankopf’s complaint alleges causes of action for breach of oral contract, negligence and incompetence, and professional negligence. The district court granted Peterson’s motion to dismiss under NRCP 12(b)(5). It concluded that because NRS 40.615 defines a constructional defect as a “defect in the design . . . of an alteration of or addition to an existing resident, or of an appurtenance” and NRS 40.605 defines an appurtenance as including “the parcel of real property,” the Pankopf’s fell within NRS Chapter 40’s purview. Because the Pankopfs did not comply with certain requirements set forth in NRS Chapter 40, the district court dismissed the complaint without prejudice in order to proceed in accordance with NRS Chapter 40.

Discussion

In an appeal from an order granting an NRCP 12(b)(5) motion to dismiss, the sole issue is whether a complaint states a claim for relief.² NRS Chapter 40 provides a process for resolving constructional defect disputes between contractors and homeowners.³ The district court determined that the Pankopfs’ claims fell within this chapter based on its interpretation of the terms “construction defect” and “appurtenance.” The first issue is whether these claims properly come within this chapter. NRS 40.615 defines a constructional defect as follows:

¹ Summarized by Danielle Tarmu

² Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739,741 (1980).

³ Westpark Owners’ Ass’n v. Dist. Ct. 123 Nev. ____, 167 P.3d 421 (2007).

A defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance.

NRS 40.605(1) defines an appurtenance as “a structure, installation, facility, amenity or other improvement that is appurtenant to or benefits one or more residences,” and includes “the parcel of real property,” which must be “associated with or benefiting one or more residences.”

Here, because no residence exists, the parcel of real property cannot constitute an appurtenance. Also, the Pankopfs primarily complained of mistakes in the plans for their house, not in the design of any appurtenance. Therefore, the claims do not fall under NRS Chapter 40, based on the plain language of the definitions set forth in NRS 40.615 and NRS 40.605(1).

The second issue is whether NRS Chapter 40 applies to the design of a new residence when the residence has not been built. A residence is “new” when it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale.⁴ Because the residence in this case has not been completed, it is not a “new residence” for the purposes of NRS Chapter 40.

Conclusion

The Pankopfs did not make “constructional defect” claims for the purposes of NRS 40.615 and NRS 40.605(1), nor did they bring suit regarding “new construction” as defined by NRS Chapter 40. Accordingly, NRS Chapter 40 does not apply to the Pankopf’s claims. Consequently, the Nevada Supreme Court reversed and remanded the case for further proceedings consistent with this opinion.

⁴ Westpark Owners’ Ass’n, 123 Nev. at ____, 167 P.3d at 429.