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Summary of Westpark Owners' Ass'n v. Dist. Ct., 123 Nev. Adv. Op. No. 37

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*Westpark Owners' Ass'n v. Dist. Ct., 123 Nev.
Adv. Op. No. 37 (Sept. 20, 2007)*¹

PROPERTY – STATUTORY INTERPRETATION – RESIDENTIAL
CONSTRUCTIONAL DEFECT

Summary

Homeowners' Association's (Association) petition for a writ of mandamus or prohibition against partial summary judgment, granted by Eighth Judicial District Court, in a declaratory relief action brought by the project developer and contractor (Westpark).

Disposition/Outcome

Petition granted in part. The court issued the writ and further instructed the court to consider whether and the extent to which any of the alleged defects arose from alterations or additions made in preparation for sale, and whether any of the Association's non-Chapter 40 claims survive.

Factual and Procedural History

Westpark acquired a partially completed residential development located in Las Vegas through the bankruptcy proceedings of the original developer, Park Lake Partnership. Westpark proceeded to build an additional 108 units within the complex. While these units were referred to as "apartments" in several loan documents, the building permits and certificates of occupancy identified the units as "new condominiums." Westpark annexed the 108 units into the existing homeowners' association, forming the 144-unit "Westpark Owners' Association."

Westpark leased the additional 108 units to individual tenants from 1997 until 2003, when it began to offer the units for sale on the open market. At time of sale, Westpark entered into separate sales agreements with each buyer.

When problems arose between the Association and Westpark, the Association served Westpark with a formal NRS Chapter 40 notice alleging numerous constructional defects. Westpark responded by filing a complaint for declaratory and injunctive relief. At issue was Westpark's assertion that the Association was barred from bringing any constructional defect claims under NRS Chapter 40 with respect to the 108 units, as the units were not "new" or constructed as "residences" within the provisions of NRS Chapter 40. In response, the Association filed answers and counterclaims, alleging claims for breach of implied warranty, breach of express warranty, and negligence.

The partial summary judgment entered by the District Court generally declared that Westpark had "no liability" in connection with the development of sale of the 108 later-constructed units. The district court supported its determination, in part, by stating the following (pertinent) conclusions of law in the written order:

- NRS 40.630 defines a "Residence" as any dwelling in which title to the individual units is transferred to the owners;
- [W]hen Westpark did transfer title in 2003, it did not transfer title to a **new** residence as contemplated by NRS 40.615. (emphasis added)

¹ By Barbra E. Zess.

The Association responded by petitioning for a writ of mandamus or prohibition challenging the district court's entry of partial summary judgment in the declaratory relief action in favor of Westpark. The Supreme Court decided to exercise its discretion to intervene, citing *Ducharm*² as support.

Discussion

The petition challenged the District Court's interpretation concerning the scope of constructional defect remedies under NRS Chapter 40. The Court agreed that NRS Chapter 40 applies only to "contractors" who construct "new residence[s]" or "alter[] or add[] to... existing residence[s]."³

However, the crux of this case is the Supreme Court's exploration of the meaning of the terminology "new or altered residences."

Meaning of "residence"

NRS 40.630 defines "[r]esidence [as] any dwelling in which title to the individual units is transferred to the owners." The Court rejected Westpark's contention that the District Court correctly decided that Westpark did not construct residences because the units were originally built as apartments. Whether or not the units were constructed as apartments or condominium units,⁴ the plain wording of NRS 40.630 instructs that the event conferring "residence" status on a dwelling is the transfer of title to a home purchaser. The Court concluded that the purchasers of the 108 units became owners of "residences" as that term is defined under NRS 40.630 when the 2003 transfers of title occurred.

Meaning of "new" or "altered" residence

Because NRS Chapter 40 contained no additional definitions of a "new" or altered" residence and the parties argued for two different meanings of "new," the Court declared there was "imperfect clarity" in the statute requiring the Court to discern its meaning.

The Association argued that "new" does not refer to chronological age of the residence and that the contractor is subject to liability for constructional defects in a "new residence" when it sells a residence that it originally constructed. The premise for the Association's argument was the purpose underlying the statutory scheme: to protect the rights of homebuyers by providing a process to hold contractors liable for defective original construction or alterations. The

² State of Nevada v. Dist. Ct. (*Ducharm*), 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). In pertinent part: "This court may exercise its discretion to entertain a petition for mandamus under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition."

³ NEV. REV. STAT. § 40.615 (2007). NRS 40.615 defines a "constructional defect" as, in pertinent part: "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..."

⁴ The Court incidentally noted that the District Court incorrectly determined that the 108 units were originally constructed as apartments rather than condominium units. While Westpark may have identified the units as "apartments" in several loan financing documents related to the project, the buildings were mapped as condominiums, and the building permits and certificates of occupancy identified the units as "new condominiums." The Court concluded that Westpark originally constructed and maintained the units as condominiums that Westpark individually owned and rented to third parties

Association argued that contractors may thwart this purpose by potential abusive interpretations of the statute.⁵

Westpark asserted that, for the purposes of NRS Chapter 40, the 108 units were no longer “new residences” because they were occupied for a substantial period of time before they were sold to the general public. The Court agreed that to hold that condominium units occupied for a period of seven years are “new” would be absurd – clearly conflicting with the common meaning of the term.

The Court “divined” the following reasonable interpretation of the term: “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.” In the opinion of the Court, this definition preserves the legislative purpose of providing homeowners a fairly expansive remedy, as any unoccupied residential dwelling left vacant for a period of time or used as a model home before sale is, in general parlance, still a “new residence” under NRS 40.615. This definition also avoids the absurd result that a unit occupied as a dwelling for several years could still be a “new residence.”

Conclusion

The units in question were “residences” for the purposes of NRS Chapter 40 because title to the 108 condominium units constructed by Westpark was transferred to individual purchasers at the time of sale. However, the units are not “new” under NRS 40.615 because the units were occupied on a rental basis for seven years before sale. Therefore, the remedies of NRS Chapter 40 only apply to the Association’s claims if Westpark altered or repaired the units prior to sale and the defects are related to those alterations or repairs. Accordingly, the Court concluded that the district court abused its discretion in foreclosing the opportunity to litigate the Association’s claims arising from any alterations or repairs to the 108 condominium units, and in foreclosing any of the Association’s non-Chapter 40 claims.

⁵ For example, the purpose is defeated if contractors may escape the provisions of NRS Chapter 40 by building housing units and then waiting to sell the units for a period of time until they are no longer “new.” Similarly, if contractors could circumvent liability by using units as “model homes” or leasing units to “strawmen” for a period of time before offering them for sale, the purposes of NRS Chapter 40 are undermined.