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Summary of Oxbow Constr. v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 86

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Oxbow Constr. v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 86 (Oct. 16, 2014)[1]

CLASS ACTIONS; CONSTRUCTION DEFECTS

Summary

The Court determined that (1) previously leased units become a "residence" under NRS 40.630[2] when their titles are later transferred to a home purchaser; (2) units previously leased prior to transfer of title to a purchaser are not considered "new" under NRS 40.615;[3] and (3) where there is at least one "new residence" in a multiple unit building, relief is available for construction defects in the limited common areas assigned to that building.[4]

Background

El Capitan Associates (El Capitan) hired Oxbow Construction, LLC as its general contractor for the construction of The Regent at Town Centre mixed-use community (Town Centre). As construction completed in stages, El Capitan leased many of the units as apartments. Upon completion of Town Centre, El Capitan sold the units to Regent Group II, LLC (Regent II). Regent II then sold all of the units to individuals. The Regent at Town Centre Homeowners' Association (the Association) served Oxbow with notice to pursue NRS Chapter 40 construction defect claims. The district court, ruling on several motions, declared that NRCP 23 class action analysis was not required, that previously leased units were not considered "new residences" for the purpose of construction defect claims, and that the Association could pursue claims for construction defects in limited common areas assigned to multiple units where at least one unit was a new residence. Both sides filed writ petitions with the Court challenging the district court's decisions on these issues.

Discussion

Writ relief

The Court determined that consideration of a writ of mandamus is appropriate here because the litigation contained important legal issues and it was in the interest of sound judicial economy and administration.

NRCP 23 analysis

The Court applied its rule from *Beazer Homes* declaring that a homeowner's association may bring claims on behalf of itself or its unit-owners without the requirement of a NRCP 23 class action analysis, so long as the association does not wish to proceed in a class action

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[1] By Erik Foley.

[2] NEV. REV. STAT. § 40.630 (1997).

[3] NEV. REV. STAT. § 40.615 (2003).

[4] The Court also reaffirmed that the district court is not required to perform a NRCP 23 class action analysis when a homeowner's association files claims on behalf of its unit-owners unless the homeowner's association wishes to proceed in a class action format.

format.[5] Oxbow argued that the district court abused its discretion when it failed to perform a NRCP 23 analysis when requested. The Court rejected this argument, stating that even though a NRCP 23 analysis was requested, the district court was not obligated to perform the analysis because the record did not reflect that the Association desired to proceed in a class action format.

"New residence"

The Court held that the previously leased units were "residences" but not "new" for construction defect purposes. The Court determined that the previously leased Town Centre units became "residences" under NRS 40.630[6] when El Capitan transferred the titles to Regent II, even though some had been leased as apartments. In doing so, the Court applied its holding from *Westpark*, declaring that a dwelling gains "residence" status upon transfer of title to the home purchaser.[7]

The Court also declined to expand its definition of "new" as stated in NRS 40.615[8] and interpreted in *Westpark*[9]. The Court reaffirmed its rule that a residence is considered new for construction defect purposes if it has remained unoccupied from the completion of construction until it is originally sold. The Association had asked the Court to adopt a sliding-scale test that considered the residence's age and duration of occupancy. In declining to do so, the Court found that the Town Centre units that had been previously leased prior to their sale to Regent II were not "new" for the purposes of construction defect litigation.

NRS Chapter 40 remedies for limited common elements assigned to multiple units in a common building containing at least one "new residence"

Oxbow argued that the limited common elements at issue here were appurtenances which must be "new" to qualify for NRS Chapter 40 relief. The Court applied a syntactic rule of statutory interpretation to determine that an appurtenance need not be "new" for construction defect purposes.[10]

The Association argued that the building containing the limited common element at issue need not have a "new residence" because these elements should be classified as pure common elements. The Court determined that the CC&Rs[11] of Town Centre expressly provided that common elements assigned for the use of more than one unit are limited common elements, and that CC&Rs are free to assign limited common elements differently than the NRS.[12]

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[5] Beazer Homes Holding Corp. v. Eighth Judicial district court, 128 Nev. ___, ___, 291 P.3d 128, 134 (2012).
[6] NEV. REV. STAT. § 40.630 (1997).
[7] Westpark Owners' Ass'n v. Eighth Judicial Dist. Court, 123 Nev. 349, 358, 167 P.3d 421, 427–428 (2007).
[8] NEV. REV. STAT. § 40.615 (2003).
[9] Westpark, 123 Nev. at 360, 167 P.3d at 429.
[10] The Court determined that the word "new" in the statue only applied to residences because "a/an" preceeded the other items in the list: "'Constructional defect' means 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 . . . ." NEV. REV. STAT. § 40.615 (2003).
[11] Covenants, Conditions and Restrictions
[12] *See* NEV. REV. STAT. § 116.2102 (2003) (stating that "[a]ny shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, pads and mounts for heating and air-conditioning systems, patios and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.").

Finally, the Court held that where there is at least one "new residence" in a multiple unit building, relief is available for construction defects in the limited common areas assigned to that building. The Court stated that, to hold otherwise, would preclude new purchasers in a multiple unit dwelling from seeking relief for construction defects when another unit had already been purchased; thus, failing to protect the rights of homebuyers.

Conclusion

The Court ruled that the district court did not abuse its discretion when it declined to perform a NRCP class action analysis because the Association was not proceeding in a class action format. The Court also ruled that the district court correctly determined that a previously leased unit that is then sold to an individual purchaser is a "residence" but not "new" for the purposes of construction defect litigation. Finally, the Court ruled that the district court correctly decided that a claim may proceed where there is a construction defect in a limited common element assigned to multiple units in a building where at least one of those units is a "new residence."