

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUMMA CORPORATION, A
DELAWARE CORPORATION,
Appellant,

vs.

ECHO BAY EXPLORATION, INC., A
DELAWARE CORPORATION, AND
ECHO BAY MANAGEMENT
CORPORATION, A DELAWARE
CORPORATION,
Respondents.

No. 45695

FILED

MAR 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Sibard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART,
VACATING IN PART AND REMANDING

This is an appeal from a district court judgment in a contract action and a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

In 1977, appellant Summa Corporation sold various mining properties to Houston Oil and Minerals (HOM) and, under the terms of the sale agreement, Summa retained a net smelter return (NSR) royalty. According to the final agreement signed by both parties, NSR is defined as “the net payments received from a smelter, mill, reduction works, refinery or other processor or purchaser after deduction for [various charges from a processor or purchaser, transportation costs, and taxes].” The agreement further provided that, “[i]n the event that the ores, concentrates or other minerals are treated at a mill or smelter owned or operated by HOM or any affiliated corporation of HOM, the charges for processing and milling services shall be deductible from the proceeds to determine Net Smelter Returns.”

In 1983, when Tenneco¹ began operating an on-site ore-crushing mill with an increased ore capacity, Tenneco deducted these on-site ore milling costs from the NSR when it calculated Summa's royalty payments. In 1991, Summa audited the royalty payments and concluded that it had not been paid sufficient royalties because, according to Summa, the agreement's milling costs language referred to a smelter or reduction works, or processing the ore after it had been crushed by Echo Bay's ore-crushing mill. In 1997, Summa sued for breach of contract and for breach of the covenant of good faith and fair dealing.

Upon completion of a bench trial in 1997, the district court found in Echo Bay's favor, concluding, among other things, that the agreement was unambiguous and that the deductions taken by Tenneco and Echo Bay for on-site processing and milling expenses were permissible. On appeal, this court concluded that the agreement was ambiguous and remanded the case to the district court for determination of the appropriate NSR royalties.² In 2005, the district court heard additional testimony and found that Echo Bay was entitled to deduct its on-site milling costs in the NSR calculation before it paid the royalty to Summa.

¹Through a series of corporate acquisitions, Tenneco Minerals Company (Tenneco) acquired the mining properties from HOM, and Echo Bay acquired the properties from Tenneco.

²See Summa Corporation v. Echo Bay Exploration, Inc., Docket No. 31292, consolidated with Docket Nos. 31471 and 31592 (Order of Reversal and Remand, April 26, 2000; Order Modifying Order, August 16, 2001).

Summa appeals, arguing that the district court abused its discretion when it found that Echo Bay could deduct milling costs and when it granted Echo Bay attorney fees under NRCP 68 and NRS 17.115.

Contractual interpretation

In a previous order, we concluded that the agreement was ambiguous with regard to which milling expenses were deductible from the NSR royalties. When a contract is ambiguous,

extrinsic evidence may be admitted to determine the parties' intent, explain ambiguities, and supply omissions. In determining the parties' intent, the trier of fact must construe the contract as a whole, including consideration of the contract's subject matter and objective, the circumstances of its drafting and execution, and the parties' subsequent conduct.³

While "[t]his court reviews the [district court's] construction [and interpretation] of a contract de novo,"⁴ when facts are in dispute "[t]his court reviews the district court's findings of fact for an abuse of discretion, and this court will not set aside those findings 'unless they are clearly erroneous or not supported by substantial evidence.'"⁵ "Substantial

³Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) (citations omitted).

⁴NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 661 (2004).

⁵Id. at 739, 100 P.3d at 660-61 (quoting Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001)).

evidence has been defined as that which ‘a reasonable mind might accept as adequate to support a conclusion.’”⁶

On remand, the district court considered testimony from various witnesses, who testified that: (1) HOM would not have signed an agreement unless it could have deducted its milling costs; (2) Summa drafted the definition of NSR, including references to milling costs; (3) Summa had a chance to review the proposed royalty calculation in 1984, and only objected to one item of costs; and (4) Summa accepted that royalty calculation as accurate for nine years. While the district court did not bind Summa to a witness’s statements that the NSR calculations were subject to on-site ore milling cost deductions, it accepted the statements as indicating Summa’s understanding because no evidence indicated that Summa had a contrary understanding. Summa’s evidence consisted of experts defining the industry standard deductions from NSR. But the experts admitted that the parties could depart from the industry standards and define their own deductions to NSR.

Upon review of the record, we conclude that substantial evidence supports the district court’s findings that Echo Bay may deduct its milling costs from the NSR royalty. Accordingly, the district court did not abuse its discretion.

However, the district court’s order does not address the various deductions included in Echo Bay’s October 1996 royalty statement. In addition to the milling costs, Echo Bay deducted costs for engineering, geology, safety, buildings & grounds, access roads, autos & pickups, water

⁶State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).


systems, accounting, summer students, human resources, purchasing, and other items that appear to have nothing to do with milling costs or other allowable deductions. Based on the record, we are unable to determine whether, under the agreement, these costs are deductible. Therefore, we remand the matter for the district court to consider whether Echo Bay may deduct these remaining costs under the agreement.

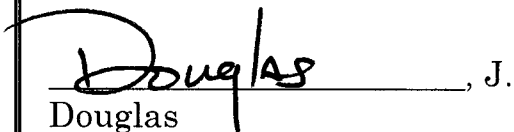
Attorney fees

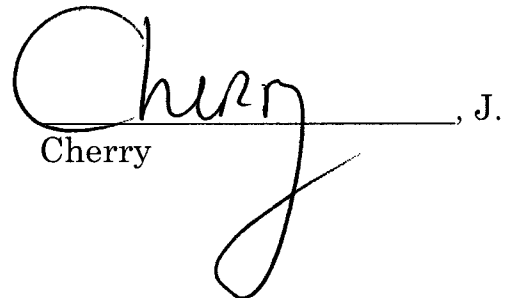
As we are remanding this matter to the district court, we also vacate the district court's order awarding attorney fees.

However, we briefly observe that an offer of judgment given before the first trial may support an award of attorney fees at the close of the case, even after one or more mistrials or retrials. Additionally, the district court is required to state, in its written order, its reasoning using the Beattie v. Thomas⁷ factors for any attorney fee award under NRCP 68 or NRS 17.115.

It is so ORDERED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁷99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); see also Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 322-23, 890 P.2d 785, 789 (1995) (explaining that Beattie factors should have express, written support in the district court's attorney fee order).

cc: Hon. Sally L. Loehrer, District Judge
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