IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH C. GUSTIN, III,
Appellant,
vs.
THORNTON D. BARNES, A/K/A T.D. BARNES, AND DORIS W. BARNES, INDIVIDUALLY AND AS HUSBAND AND WIFE; GENEVA MINERALS, INC., A NEVADA CORPORATION; PHOENIX METALS U.S.A. II, INC.; A COLORADO CORPORATION; ROBERT F. FLAHERTY AND DIANA LEE FLAHERTY, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND ROBERT F. FLAHERTY AND DIANA FLAHERTY, INC., A NEVADA CORPORATION,
Respondents.

No. 35709

FILED
MAY 09 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Ralph C. Gustin, III, appeals from an NRCP 41(b) judgment of involuntary dismissal and from an order denying a motion for a new trial in a mining dispute. On appeal, Gustin contends primarily that the district court erred in concluding that his asserted possessory interest in the disputed millsite was not enforceable and that he was therefore not entitled to collect "rent" from the respondents.

Basic mining law requires that one claiming possessory rights in non-mineral public land for milling purposes use the site claimed – or lose it.[1] In the case at hand, the district court based its NRCP 41(b)

[1]See NRS 11.060(1) (precluding actions "for the recovery of the possession" of mining claims "unless it appears that the plaintiff . . . [was]

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dismissal on Gustin's failure to set forth a prima facie showing that he had used – or even occupied – the disputed millsite during the time period necessary to establish an enforceable possessory interest. We conclude that Gustin's own testimony supports the district court's conclusion that Gustin had not used the millsite during the relevant time period. Accordingly, we conclude that the district court did not err in granting the respondents' NRCP 41(b) motion for involuntary dismissal.[2]

Gustin's various contentions on appeal center on the same theme, namely, that he is the millsite's valid successor in interest according to an unbroken chain of record that predated the respondents' possession of the millsite. From that premise, Gustin discusses the U.S. Cobalt abandonment of the millsite, the previous proceedings concerning possessory title in the district court, Bureau of Land Management, and Interior Board of Land Appeals, Mr. Barnes's alleged failure to record his interest, and the fact that the BLM's current records reflect Gustin as the

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. . . *continued*
seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within 2 years before the commencement of such action."); 43 CFR § 3844.1 ("A millsite is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode or placer claim with which it is associated."); United States v. Webb, 132 IBLA 152, 181 (1995) (noting that "[p]ossessory title must be established by the maintenance of actual, open, and exclusive possession of the claim by the claimant combined with development"); 53A Am. Jur. 2d Mines and Minerals § 49 (1996) (noting that "it is said that the failure to continually work an unpatented location claim will result in its abandonment").

[2]Barelli v. Barelli, 113 Nev. 873, 880, 944 P.2d 246, 250 (1997) (noting that the plaintiff must present a prima facie case in order to survive an NRCP 41(b) motion to dismiss).

possessor of record. These arguments, however, are wholly irrelevant in light of the district court's conclusion that Gustin's asserted interest was lost due to his failure to establish use.[3]

Gustin also contends that the district court erred in granting summary judgment as to his two pre-amendment complaints. Both complaints, however, were premised on the assumption that Gustin held an enforceable possessory interest in the millsite. Because he did not hold an enforceable possessory interest, we need not address Gustin's arguments regarding the statute of frauds, laches, and the ultimate propriety of the summary judgments.[4]

For their part, the Barnes/Geneva respondents contend that Gustin's appeal is so lacking in merit that Gustin's attorney, Stanley Pierce, Esq., should be sanctioned for having filed a frivolous appeal.

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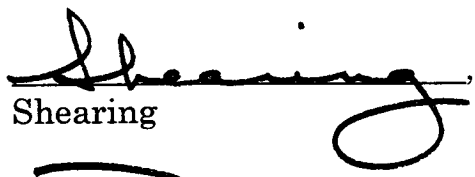
[3]See 53A Am. Jur. 2d Mines and Minerals § 47 (1996) ("Recordation by itself does not render an otherwise invalid claim valid or waive assessment or other requirements." (citing 43 U.S.C.S. § 1744(d) and 43 C.F.R. § 3833.5(a))); see also 25 Corporation, Inc. v. Eisenman Chemical, 101 Nev. 664, 673, 709 P.2d 164, 170-71 (1985) (noting that a location certificate is merely "a unilateral document which is recorded to place notice on the public records that the locators have appropriated federally owned minerals on the public domain . . . ." and "does not create an interest in those minerals--especially when it turns out the claim is invalid.").

[4]For this reason, we also reject Gustin's contentions that the district court should have entered judgment against the successors-in-interest to Barnes/Geneva, the Flaherty/Phoenix Metals respondents, and that the district court erred in denying Gustin's motion for a new trial.

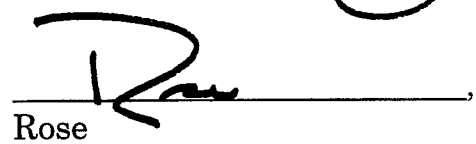
Although we agree that Gustin's appeal lacks merit, we conclude that it is not so frivolous that sanctions are warranted.[5]

Having concluded that all contentions on appeal lack merit, we

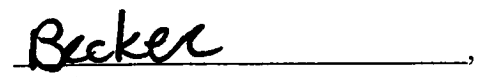
ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Nancy M. Saitta, District Judge
Stanley W. Pierce
Roger L. Harris
Kummer Kaempfer Bonner & Renshaw
Clark County Clerk

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[5]See NRAP 38 (noting this court's discretion in sanctioning parties on appeal).