IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALTENBERG MEDIA INTERNATIONAL, INC., A NEVADA CORPORATION,
Appellant,
vs.
ROBINS 1 AND 2, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 85814-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Altenberg Media International, Inc. (Altenberg) appeals from an amended final judgment following a bench trial and a post-judgment order awarding attorney fees in a contract and tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

In September 2002, Sidney Harrington and Marsha Jones, who each owned a 50-percent interest in unpatented mining claims "Robin No. 1" and "Robin No. 2" entered into a 20-year lease agreement granting Altenberg the right to extract raw material from the claims.[1] The lease agreement required Altenberg to pay either a minimum monthly rental fee or a per-ton royalty on extracted material, whichever was greater, with payments due by the third Monday of the following month. The lease agreement also required Altenberg to maintain the claims in compliance

[1]An "unpatented mining claim" gives a person the right to mine "locatable" minerals on public land, but they do not own the land and must follow government rules, and it can also refer to the mining site itself. *See* NAC 517.110.

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with "all applicable laws (including all state and federal environmental laws applicable to the [p]remises), regardless of whether any such applicable law expressly allocates the burden of such compliance to [Altenberg] or another party." The agreement also contained a title warranty provision, which stated:

> Lessors hereby warrant their title to the property is good, free of all liens and encumbrances which may impact the underlying purpose of this Lease and do hereby agree to defend the title to the demised Premises at their own expense such that Lessee may benefit from quiet enjoyment of the same.

Additionally, the lease included a provision authorizing an award of attorney fees to the prevailing party in any litigation related to the agreement.

In late January 2009, Altenberg's chief operating officer, Joe Collet, received a call from a Bureau of Land Management (BLM) geologist, who informed him that Altenberg's plan of operations for the claims had expired and needed to be resubmitted.[2] About a month later, Collet attended a meeting with several BLM representatives, who reiterated that Altenberg needed a complete plan of operations to continue mining and also raised concerns about the claims' locatability.[3] Consequently, Altenberg had to shut down its mining operations.

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[2]A plan of operations must be submitted to BLM before beginning any mining operations that are greater than "casual use." *See* 43 C.F.R. 3809.11. "Casual use" means activities ordinarily resulting in no or negligible disturbance of the public lands or resources, such as collection of mineral specimens using hand tools. 43 C.F.R. 3809.5.

[3]Locatable minerals are valuable mineral deposits that can be claimed under the General Mining Law of 1872, provided they are not

By this time, Harrington and Jones had placed their interests in the mining claims in living trusts (sometimes referred to collectively as the lessors) and later passed away. Collet emailed Kristin Dovalina,[4] who is the trustee of the trust that acquired Harrington's interest—the Sidney L. Harrington Family Trust—requesting a suspension of lease payments until Altenberg could resume mining. Although no agreement to suspend rental payments was reached, Dovalina followed up with BLM, clarifying that her family had maintained mining claims on the properties since at least the 1940s, qualifying them as valid.[5]

Collet continued working with BLM officials to resolve the compliance issues, but on August 3, 2009, BLM issued a written notice to Altenberg pursuant to 43 C.F.R. 9239.0-7, stating that "investigation and

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classified as leasable or salable under separate laws. *See* 43 C.F.R 3830.11. To establish a valid mining claim, a miner must "locate" a valuable mineral deposit on public land; without this discovery, the claim is invalid and grants no legal rights. *See* 30 U.S.C. § 23 ("[N]o location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."); *id.* § 26 (conferring on a successful locator "the exclusive right of possession and enjoyment" of the surface and the minerals underneath). BLM has the authority to make final determinations whether valuable minerals have been found on a mining claim and, thus, whether the claim is valid. *See Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336 (1963).

[4]Dovalina is the daughter of Sidney Harrington.

[5]If a mining claim was filed and found to be locatable before July 23, 1955, operations could proceed without BLM completing a "mineral examination" report to determine whether the material was a "common variety" mineral (which would render the claim invalid) or a "locatable" mineral. *See* 43 C.F.R. 3809.101(a).

evidence tend to show you are in trespass."[6] Altenberg later paid a $1,085 fine to BLM for the trespass. After BLM issued the trespass notice to Altenberg, Dovalina corresponded with BLM again to address locatability concerns and reached out to her local congressional representative in an attempt to expedite the approval process.

BLM approved Altenberg's plan of operations on August 28, 2009, leaving the only outstanding issue the locatability of the claims. While BLM conducted a mineral examination report to assess locatability, Altenberg, with the consent of the lessors, entered into a separate contract with BLM on August 31, 2009, granting it the right to mine 600 cubic yards of "common variety" clay from the mining site. Dovalina later testified that she expected Altenberg to start paying both its overdue and future rents now that operations could resume. Although Altenberg extracted 600 cubic yards of material from the claims under its contract with BLM, it never paid the overdue rents.

Over the next year, communication between Collet and Dovalina became infrequent. In 2010, Dovalina attempted to collect the unpaid rents from Altenberg, but Collet refused to pay. Thereafter, Dovalina informed BLM that the lessors would not consent to Altenberg entering into another contract to mine material from the claims. In August 2010, the Sidney L. Harrington Family Trust transferred its 50-percent interest in the mining claims—including the lease agreement—to respondent Robins 1 and 2, LLC (Robins), where Dovalina serves as the managing member.

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[6]It is unclear why BLM issued this trespass notice, as the record indicates Altenberg had ceased all mining operations. Nevertheless, Altenberg failed to appeal the decision under 43 C.F.R. 2808.11(f).

After Altenberg's contract with BLM expired, Dovalina sent Collet a letter on September 2, 2011, stating that "it appears you have decided not to work the claims," as Collet had been out of correspondence, a situation the district court later determined effectively terminated the lease agreement.[7] From January 2009 to August 2011, during which Altenberg paid no rents, a total of $70,800 was due pursuant to the lease's minimum monthly rental amount. Altenberg never exceeded the tonnage requirement in the lease; therefore, it was only obligated to pay the minimum monthly rental and not the additional running royalty.

In January 2015, Robins filed the underlying action against Altenberg. The operative complaint asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and trespass. Robins alleged that Altenberg breached the lease agreement by failing to pay rents from January 2009 to August 2011 and trespassed by unlawfully entering the mining claims and removing materials without permission. Altenberg counterclaimed against Robins, claiming breach of contract, breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and specific performance.

After stipulating to extend the five-year rule under NRCP 41, the matter proceeded to a bench trial beginning on May 17, 2021. At the conclusion of the trial, the district court found for Robins on its breach of

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[7]*See* NRS 104.2106(4) ("'Cancellation' occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.").

contract and trespass claims and against Altenberg on its counterclaims.[8] In its written order, the court concluded that the lease was an enforceable agreement and that Altenberg materially breached it by failing to pay the required minimum monthly rents from January 2009 to August 2011. The district court also determined that Altenberg committed trespass by taking 600 cubic yards of material without payment.

The district court awarded Robins $43,200 in compensatory damages for rents from January 2009 through August 2010 for breach of contract. Additionally, Robins was awarded $27,600 in punitive damages for trespass, covering rents from September 2010 through August 2011. The total award amounted to $70,800, which was reduced by 50-percent to $35,400, reflecting Robins's half ownership of the claims. Altenberg then filed a motion for attorney fees and costs, which the district court granted, stating it had analyzed the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). This appeal followed.

Standards of Review

After a bench trial, the district court's legal conclusions are reviewed de novo. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018). Likewise, this court reviews contract interpretation de novo by looking to the language of the contract and surrounding circumstances. *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011). A district court has broad

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[8]Because the district court's written order did not resolve Robins's claim for breach of the implied covenant of good faith and fair dealing, Robins and Altenberg stipulated to dismiss the claim with prejudice during the pendency of this appeal.

discretion in calculating a damages award, and such an award will not be overturned on appeal absent an abuse of discretion. *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994). Decisions regarding attorney fee awards are also reviewed for an abuse of discretion. *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Ct. App. 2015).

The district court did not err by ruling in Robins's favor on its breach of contract claim

Altenberg argues the district court erred in ruling against it on the competing breach of contract claims, asserting the lessors failed to provide quiet enjoyment and defend title under the lease, which excused its nonpayment of rents. Robins responds Altenberg breached the lease agreement by failing to pay the minimum monthly rents from January 2009 to August 2011. We agree with Robins.

"To prevail on a claim for breach of contract, the plaintiff must establish (1) the existence of a valid contract, (2) that the plaintiff performed, (3) that the defendant breached, and (4) that the breach caused the plaintiff damages." *Iliescu v. Reg'l Transp. Comm'n of Washoe Cnty.*, 138 Nev. 741, 746, 522 P.3d 453, 458 (Ct. App. 2022). "When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform." *Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (citing Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981)).

Here, the lease agreement was an exchange of promises to perform. That is, Sidney Harrington and Marsha Jones, as the original lessors, promised to lease the Robin No. 1 and Robin No. 2 mining claims, pledging that their title to the claims was good. In exchange, Altenberg promised to pay either the greater of the minimum monthly rent or the corresponding running royalty per ton, due by the third Monday of the

following month. The lease also required the lessors to defend title to the claims, ensuring Altenberg's right to quiet enjoyment.

Altenberg mined the claims without issue for over six years, but failed to pay rent for January 2009, which was due in February 2009. Altenberg argues its non-payment was justified because it was forced to stop mining after BLM raised concerns about Altenberg's noncompliance with applicable regulations during a phone call with Joe Collet, in which Collet was instructed to draft a new plan of operations in accordance with the law. *See* 43 C.F.R 3809.11. Although BLM later questioned the validity of the mining claims, it never informed the lessors that their claims were not locatable. It was not until August 2009 that BLM formally issued a trespass notice against Altenberg due to questions of locatability, indicating the claims were potentially invalid. *See* 43 C.F.R 9239.0-7; *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1215 (9th Cir. 2022) ("A mining claim is valid only if valuable minerals have been found on the claim.") (citing 30 U.S.C. §§ 22, 23, 26).[9]

By the time the trespass notice was issued, Altenberg was already six months delinquent in rents, making it the first party to breach. Any purported failure by the lessors to convey good title to the claims was excused by Altenberg's earlier non-payment and non-compliance with federal law, both of which were specifically accounted for in the lease agreement. *See Cain*, 134 Nev. at 196, 415 P.3d at 29. Furthermore, following BLM's issuance of a trespass notice against Altenberg, Dovalina,

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[9]It does not appear that Robins's claims were invalid, as BLM's preliminary environmental assessment in December 2016 concluded that the claims contained "a deposit of an uncommon variety of a locatable mineral (diatomaceous earth)."

as trustee for the Sidney L. Harrington Family Trust, worked with BLM to resolve the locatability issue and validate the claims, thereby fulfilling the obligation to defend Altenberg's right to quiet enjoyment. Therefore, the district court properly found in favor of Robins on the breach of contract claim and denied Altenberg's counterclaims, all of which arose from the alleged breach of contract.

The district court erred in ruling in favor of Robins on its trespass claim, but did not abuse its discretion in calculating Robins's damages

Altenberg further argues the district court erred in finding it liable for trespass, asserting that it had consent to enter into a contract with BLM and remove materials and that no evidence shows it took materials after the contract expired. In response, Robins contends that Altenberg unlawfully removed material from the mining claims and lacked proper consent, as any consent was conditioned on paying the required rents.

"[T]o sustain a trespass action, a property right must be shown to have been invaded." *Lied v. County of Clark*, 94 Nev. 275, 279, 579 P.2d 171, 173-74 (1978). The Restatement (Second) of Torts, Section 892B, clarifies consent can serve as a defense for trespass. *See Marlow v. City of Sisters*, 383 P.3d 908, 912 (Or. Ct. App. 2016) (applying the Restatement (Second) of Torts § 892B).

Here, Altenberg did not commit trespass because it had valid consent to access and work the claims through the lease, which had not been canceled at the time the material was removed. *Cf. Mosher v. Cook United Inc.*, 405 N.E.2d 720, 721 (Ohio 1980) ("One who possesses a license . . . has the authority to enter the land in another's possession without being a trespasser."). The lease explicitly provided Altenberg with permission to access the property and remove material. Additionally, the lessors consented to Altenberg contracting with BLM to remove 600 cubic yards of

material. Since Altenberg had both the lease agreement and the explicit consent of the lessors to perform these activities, it did not unlawfully invade Robins's property rights, and thus no trespass occurred. Thus, we conclude that Altenberg's conduct does not constitute a trespass.

In addition to incorrectly finding Altenberg liable for trespass, the district court wrongly awarded punitive damages based on this alleged trespass. A plaintiff may not recover punitive damages for breach of contract and, although such damages are available for trespass, they may be awarded only if compensatory damages are also awarded for the claim. *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 298, 810 P.2d 775, 777 (1991) ("Punitive damages are not available on the count for breach of contract and are precluded in the absence of compensatory damages for the claim sustaining the punitive award."); *see also* NRS 42.005. Here, Robins was awarded $43,200 for unpaid rents from January 2009 to August 2010 under the breach of contract claim, along with $27,600 in punitive damages for trespass based on unpaid rents from September 2010 to August 2011, for a total of $70,800, which was then reduced by half to $35,400 since Robins only held a 50-percent interest in the claims.

The district court erred in awarding punitive damages for three reasons. First, as explained above, there was no trespass because Altenberg had consent to remove the material. Second, there were no compensatory damages awarded for the alleged trespass, as the damages for that claim were purely punitive in nature. Third, the punitive damages were improperly tied to the lease agreement, as they were calculated based on unpaid rents from September 2010 to August 2011, which was the focus of the breach of contract claim. *See Clark v. Lubritz*, 113 Nev. 1089, 1096, 944 P.2d 861, 865 (1997) (explaining, in the context of claims for fraud and

breach of contract, that "[t]he plaintiff must prove that his injuries actually resulted from the fraud and not from the breach of the . . . contract. The injuries must be *entirely separate* from those suffered because of breach. Otherwise, there is too great a danger that plaintiff is using injuries resulting from the breach of contract as a basis for tacking on punitive damages" (cleaned up)).

However, the district court only determined that the damages arising from Robins's breach of contract claim equaled $43,200 for unpaid rents from January 2009 to August 2010, when the total unpaid rents equaled $70,800 for the entire period from January 2009 through August 2011. The court classified the remaining $27,600, which represented the unpaid rents from September 2010 to August 2011, as punitive damages for the trespass claim. But damages for unpaid rents during that period were incurred under the breach of contract claim. The undisputed terms of the lease agreement, along with trial testimony, establish that Altenberg owed $70,800 in unpaid rents from January 2009 to August 2011 under the contract and that Altenberg failed to make these required payments. Thus, the district court's determination that Altenberg owed $70,800 in unpaid rents is supported by substantial evidence. *N. Lake Tahoe Fire Prot. Dist. v. Bd. of Admin. of Subsequent Injury Acct. for Ass'ns of Self-Insured Pub. or Private Emps.*, 134 Nev. 763, 766, 431 P.3d 39, 42 (2018) ("Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks omitted)).

While the district court incorrectly classified the $26,700 as punitive damages for trespass instead of as compensatory damages for breach of contract, it ultimately reached the correct result by awarding Robins a total of $35,400 since Robins holds a 50-percent equity interest in

the mining claims and was therefore only entitled to half the $70,800 owed as a result of prevailing on its successful breach of contract claim.[10] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason). Nevertheless, on remand, the district court will need to amend the judgment in favor of Robins to reflect that the $35,400 in damages awarded were compensatory damages for Altenberg's breach of contract and not trespass.

The district court did not abuse its discretion when awarding Robins attorney fees

Finally, although Altenberg challenges the district court's post-judgment order awarding Robins attorney fees, it only does so on grounds that the underlying judgment in favor of Robins should also be reversed. However, because the district court properly found Altenberg liable for breach of contract and awarded Robins $35,400 in damages for the reasons discussed above, we conclude that Altenberg's challenge to the post-judgment order awarding attorney fees necessarily fails.

Accordingly, we affirm the district court's amended final judgment to the extent the district court ruled in Robins's favor on its breach of contract claim and awarded it $35,400 in damages, but we reverse the court's ruling in Robins's favor on its trespass claim and remand for further

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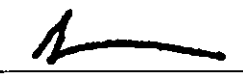
[10]Although Robins does not argue on appeal that it was entitled to the $35,400 in damages based on its breach of contract theory alone, we nonetheless reach this issue because the district court plainly erred by classifying a portion of Robins's damages related to rents under the lease agreement as punitive damages for trespass. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues *sua sponte* to prevent plain error is well established.").

proceedings consistent with this order. We also affirm the district court's award of attorney fees to Robins.

It is so ORDERED.[11]



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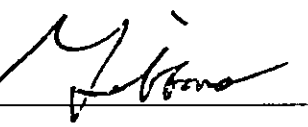

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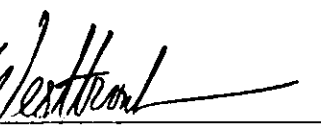

_____, J.
Westbrook

cc: Hon. Gloria Sturman, District Judge
Kaempfer Crowell/Las Vegas
Kerr Simpson Attorneys at Law
Eighth District Court Clerk

[11]Insofar as Altenberg raises arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for further relief.