IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA LAND & RESOURCE COMPANY, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY,
Appellant/Cross-Respondent,
vs.
NEWMONT USA LIMITED, F/K/A SANTA FE PACIFIC GOLD CORPORATION, A DELAWARE CORPORATION, AND NEWMONT GOLD COMPANY, A DELAWARE CORPORATION,
Respondent/Cross-Appellant.

No. 40336

FILED

OCT 0 7 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court judgment involving mineral leases. Second Judicial District Court, Washoe County; Peter I. Breen, Judge. This case involves land in northern Nevada (Nevada Lands) and its severed mineral rights, both of which were passed on to a number of different successors-in-interest throughout the years.

In 1983, two major railroad companies merged to form a new "super holding company" known as Santa Fe Southern Pacific Corp. After the merger, the new company began to reorganize its various subsidiaries and their respective holdings. Two such subsidiaries were Southern Pacific Land Company (Land) and Land's own wholly-owned mineral subsidiary SFP Minerals Corp. (SFP Minerals). Land initially held title to the Nevada Lands.

On August 1, 1985, Land and SFP Minerals entered into an exploration agreement, which authorized SFP Minerals to explore portions

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of the Nevada Lands and also authorized the parties to enter into minerals leases. Between 1985 and 1990, Land and SFP Minerals entered into more than thirty minerals leases (Minerals Leases), which allowed SFP Minerals to lease the land

> for the purposes of exploring for, developing, mining, recovering, processing, transporting and otherwise using, enjoying and exploiting Minerals and to use so much of the surface of the Property as necessary for mining, construction of plants or machinery or other structures incidental to mining and storage of waste (but not hazardous or toxic waste) or other material resulting from the normal and customary use of the Property for mining purposes.[1]

The Minerals Leases did not require lessee SFP Minerals to pay any rent or production royalty if minerals were mined from the lands, though Article 11 did address the topic of property revenues. The Minerals Leases' terms are essentially perpetual because they are conditioned upon the exercise of the rights contained therein.

Eventually, the Nevada Lands were transferred to the Atchison, Topeka & Santa Fe Railway Company (AT&SF), another wholly-owned subsidiary of the super-holding company, while SFP Minerals was merged into Santa Fe Pacific Minerals Corp., also another subsidiary. In 1990, AT&SF and Santa Fe Pacific Minerals Corp. entered into a second exploration agreement (1990 Exploration Agreement), which granted the latter the right to explore several hundred thousand acres of the Nevada Lands, while also ratifying the Minerals Leases.

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[1]Article 1(a) of the Minerals Leases.

Santa Fe Pacific Minerals Corp. eventually became Santa Fe Pacific Gold Corp. (Gold). On January 18, 1994, a representative of AT&SF signed an estoppel certificate and agreement (collectively, Estoppel Certificate), acknowledging Gold as the successor-in-interest to SFP Minerals and ratifying AT&SF's obligations under the Minerals Leases (which stemmed from AT&SF's own position as successor-in-interest to Land).

On September 30, 1994, Gold was spun-off as an independent company and, at about the same time, AT&SF decided to sell the Nevada Lands. In October 1995, California-based Western Water Company (WWC) and its financial partner, Morgan Stanley, formed a joint venture, which would later become appellant/cross-respondent Nevada Land & Resource Company (NLRC), to acquire, manage, and develop the Nevada Lands.

As a condition of its participation, Morgan Stanley sought to amend the 1990 Exploration Agreement to provide for (1) the immediate release of several hundred thousand acres in fee of the Nevada Lands and (2) a mechanism for the release of additional property over time. NLRC and Gold negotiated for such an amendment and entered into a letter agreement in October 1995. In November 1995, NLRC purchased the Nevada Lands from AT&SF. Testimony was admitted at trial that WWC, its president and CEO Peter Jensen, Morgan Stanley, and NLRC were all aware that NLRC was acquiring the Nevada Lands subject to the Minerals Leases as well as the 1990 Exploration Agreement. In December 1995, the letter agreement was converted into a formal agreement (1995 Agreement), which acknowledged that the 1990 Exploration Agreement and the Minerals Leases encumbered the Nevada Lands. In October 1996,

NLRC and Gold amended the 1990 Exploration Agreement and the 1995 Agreement with a provision affirming all terms and conditions of those Agreements, with one exception.[2]

In 1997, respondent/cross-appellant Newmont acquired Gold, while WWC sold NLRC to PICO Holdings, Inc. (PICO). PICO's president acknowledged that he was aware that the Minerals Leases were silent on the issue of rent.

Various disputes eventually arose between the parties concerning their rights and obligations under the Minerals Leases and the Exploration Agreements, but there were also some disputes that predated PICO's acquisition of NLRC and Newmont's ownership of Gold.

One dispute arose between NLRC and Gold (and later Newmont) over the right to use the surface of Minerals Leases land for support of mining activities on other properties not owned by NLRC and outside the scope of the Minerals Leases. In January 1997, NLRC learned that Newmont, then a sublessee of Gold, had constructed a mine tailings waste dump in the early 1990s on land owned by NLRC, but no actual mining had taken place on the affected portions of the Minerals Leases lands; the waste was imported from another mining property operated by Newmont.

Another dispute arose over offers NLRC had received from third parties to purchase portions of land subject to the 1990 and 1995 Exploration Agreements. NLRC submitted these offers to Newmont with the request that Newmont either match the third-party offer or release the

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[2]That excepted section was Section 7 of the 1995 Agreement, which dealt with "Transfers to Affiliates; Actual Closing."

property from the 1990 Exploration Agreement as provided under Section 6 of the 1995 Agreement. However, Newmont claimed that these offers were not bona fide offers that triggered the relevant "match or release" provision.

A dispute also arose over rents and royalties. On June 23 and July 30, 1999, John Hart, PICO's president, wrote and/or faxed two letters to Newmont's CEO expressing concern about the nonpayment of reasonable compensation for possession and use of the Nevada Lands and the need for NLRC to receive such fair compensation. Hart testified that the agreements and the Minerals Leases were silent on the issue of rent and concluded from this silence that he could ask for rent.

In 2000, shortly after this action was commenced in the district court, NLRC learned that Newmont was mining clay from a portion of the lands subject to the Minerals Leases for Newmont's use in constructing a heap leach pad on another mining property owned by Newmont.

NLRC filed this action on October 12, 1999, and filed its second amended complaint on March 20, 2000, asserting ten claims for relief:

> (1) the Minerals Leases were void for lack of consideration;
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> (2) the absence of any provision for rent or royalties in the Minerals Leases was unconscionable;
>
> (3) Newmont breached an implied covenant of the Minerals Leases that obligated it to pay fair compensation for its possession and use of the lands;

(4) Newmont breached the Minerals Leases when it constructed a mine tailings waste dump on the lands to benefit mining activities on other lands;

(5) the absence of any provision for rent or royalties in the Exploration Agreements was unconscionable;

(6) Newmont breached an implied covenant of the Exploration Agreements that obligated it to pay fair compensation for its possession and use of the lands;

(7) Newmont breached its obligation to deliver data under the 1990 Exploration Agreement;

(8) Newmont breached the 1990 Exploration Agreement when it failed to perform its right of first refusal obligations or release certain lands;

(9) Newmont breached its obligation to deliver data under the Minerals Leases; and

(10) Newmont breached the Minerals Leases when it mined clay on the lands to benefit mining activities on other lands.

Newmont moved to dismiss NLRC's first six claims, filed an answer that generally denied the allegations, and asserted six counterclaims of its own:

(1) NLRC breached the Minerals Leases and the Exploration Agreements by improperly allowing a prospector to explore for and extract gold from the lands;

(2) NLRC breached one of the Minerals Leases by denying Newmont the use of clay;

(3) requested declaratory judgment for Newmont's right to mine clay;

(4) requested declaratory judgment for Newmont's right to use the surface of the lands for a waste tailings facility;

(5) NLRC breached the Exploration Agreements by submitting non-bona fide offers under the right of first refusal; and

(6) requested declaratory judgment that the Exploration Agreements require bona fide offers to trigger Newmont's right of first refusal.

The district court granted summary judgment for Newmont on NLRC's claims 1, 2, and 5, and parts of 3 and 6, insofar as these claims were premised on the lack of consideration.

A three-week jury trial was held in April and May 2002. At the conclusion of the evidence, the parties argued cross motions for judgment as a matter of law. The district court entered judgment in favor of Newmont on claims 2, 3, 5, 6, 7, and 9 in its findings of fact, conclusions of law, and final judgment. Questions of fact were submitted to the jury, which found in Newmont's favor on claims 4 and 10. However, on claim 8, the jury found in NLRC's favor for the amount of $12,687.00.

The jury found in favor of NLRC on Newmont's counterclaim 1 and in favor of Newmont for $1.00 on counterclaim 2. On counterclaims 3, 4, and 6, the district court granted Newmont's requested declaratory judgments.[3] The district court awarded Newmont its costs in accordance with NRS 18.020(3). NLRC appeals, and Newmont cross-appeals.

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[3]Although Newmont's fifth counterclaim alleging breach of the exploration agreement by NLRC was not presented to the jury and was apparently withdrawn by Newmont, the jury implicitly determined that counterclaim in NLRC's favor when it found that Newmont had failed to properly perform under the exploration agreement in NLRC's eighth claim. Consequently, the district court's judgment was final. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991).

On appeal, NLRC first argues that the district court erred in concluding that the Minerals Leases did not contain implied covenants to pay compensation for rights in the land, which it alleges are essential elements of valid leases. NLRC acknowledges that the Minerals Leases are silent as to rent or compensation for possession, mining, or use.

Mining leases are construed like ordinary leases.[4] Leases are contracts and "the principles of contract construction apply to ascertain the scope and meaning of leases."[5] Contract interpretation is a question of law, and we review the district court's findings de novo.[6]

"Every contract should be construed so as to give effect to the intention of the parties."[7] "The intention of the parties is controlling, and where they express their rights and obligations in unambiguous terms, the courts will construe the instrument according to its plain and unequivocal meaning."[8] However, if it is not clear from the contract itself, the intent of the parties may be determined by the surrounding circumstances.[9] "Parol evidence is admissible to determine the true intent of the parties when the

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[4]53A Am. Jur. 2d Mines and Minerals § 210 (1996); see also Ala. Vermiculite Corp. v. Patterson, 130 F. Supp. 867, 872 (W.D.S.C. 1955).

[5]49 Am. Jur. 2d Landlord and Tenant § 43 (1995).

[6]All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124, 1125 (2003).

[7]Orleans M. Co. v. Le Champ M. Co., 52 Nev. 92, 99, 284 P. 307, 309 (1930).

[8]53A Am. Jur. 2d Mines and Minerals § 210 (1996); see also Ala. Vermiculite Corp., 130 F. Supp. at 872.

[9]NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997).

written instrument is ambiguous. The Court may look to the circumstances surrounding the execution of the contract and the subsequent acts or declarations of the parties to interpret unclear contract provisions."[10]

We conclude that the district court did not err in finding that the Minerals Leases contained no implied or express covenant for rent. Here, the parties intended that no rent was to be paid. First, the testimony of those involved in the drafting of the Minerals Leases, including Richard Zitting and Wayne Jarke, strongly suggest that the parties intended that no rent or royalties were to be paid from SFP Minerals to Land. Second, the Minerals Leases expressly addressed the topic of property revenue (in Article 11), but not rents or royalties. This indicates that the original contracting parties considered the financial ramifications of the contractual relationship and purposefully made provisions for them, while intentionally omitting rent or royalties.

Third, the subsequent acts and declarations of the original parties to the Minerals Leases suggested that no rent or royalties were to be paid. NLRC's predecessors-in-interest asserted no claims for rent or royalties, indicating that the parties intended that rent was not to be paid. Fourth, the subsequent agreements between successor lessors and lessees reaffirmed the intent of the original parties that no rent was to be paid.[11] These agreements included the 1994 Estoppel Certificate, the 1995 letter

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[10]Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982) (internal citation omitted).

[11]We considered NLRC's contention that the district court erred in holding that the Minerals Leases were ratified by subsequent parties, including NLRC, but conclude that it is without merit.

agreement, the 1995 Agreement, and its 1996 amendment. For these reasons, we conclude that the district court did not err in holding that there was no covenant obligating Newmont to compensate NLRC with rent for the possession, mining, or use of the Nevada Lands.

NLRC next argues that the district court erred in concluding that the Minerals Leases allowed Newmont to use the leased land for the storage of mining waste generated from mining activities that did not take place on leased land. We disagree.

Here, Article 1(a) of the Minerals Leases expressly authorized the lessee to use the surface of the leased property for storage of waste. The subsequent conduct of the parties to the Minerals Leases confirmed that the stored waste could originate from property other than those subject to the Minerals Leases. In April 1991, lessee SFP Minerals subleased to Newmont, then a separate company, its rights to use the leased land for purposes of constructing a tailings facility. Prior to granting that sublease, SFP Minerals sent a letter to lessor AT&SF informing it of the pending sublease. After the sublease was signed, Newmont regularly informed both AT&SF and SFP Minerals of the status of its waste storage activity on the land. Testimony was admitted at trial that no party objected to the sublease or the construction and use of the tailings facility until NLRC did so in 1997. However, by that time, it was clear that the parties to the Minerals Leases had intended that waste stored on the leased property could be derived from mining on non-leased property.

Thus, we conclude that there was substantial evidence to support the district court's finding that Newmont may use the Minerals Lease lands for all purposes specified in the Minerals Leases, including

the storage of mining waste, regardless of whether the related exploration or mining occurs on the property subject to that particular Minerals Lease.

NLRC next argues that the district court erred in awarding Newmont costs because the jury awarded it $12,687.00 on claim (8), which exceeded the $1.00 nominal damages the jury awarded Newmont on counterclaim (2).

"Absent an abuse of discretion, a district court's award of fees and costs will not be disturbed upon appeal."[12] NRS 18.020(3) states that a prevailing party may be awarded its costs against any adverse party against whom judgment is rendered in an action for damages, where the plaintiff seeks to recover more than $2,500.00. A party is the "prevailing party" if it succeeds on the main issues in the action.[13]

Here, Newmont prevailed on nine of ten claims brought by NLRC, which included the most significant issues of the litigation, as well as on four of its six counterclaims. Thus, we conclude that the district court did not abuse its discretion in awarding Newmont its costs as the prevailing party under NRS 18.020(3).

Having reviewed the record on appeal, including parol evidence, we conclude that the district court did not err in finding that the Minerals Leases contained no implied or express covenant for rent.

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[12]Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999).

[13]See Cooper v. Carlson, 511 P.2d 1305, 1308 (Alaska 1973); see also Pangborn v. National Advertising Co., 93 Nev. 168, 170, 561 P.2d 456, 458 (1977) (holding that appellant who did not succeed on the main issue of action nor receive a judgment in his favor was not a prevailing party entitled to costs even though the district court awarded him pro rata rents previously tendered by respondent and refused by appellant).

Neither did the district court err in concluding that the Minerals Leases allowed Newmont to use the leased land for the storage of mining waste generated on non-leased land; substantial evidence supported its finding.[14] Finally, we conclude that the district court did not err in awarding Newmont costs as the prevailing party under NRS 18.020(3). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Becker

_______________, J.
Rose

_______________, J.
Maupin

_______________, J.
Gibbons

_______________, J.
Douglas

_______________, J.
Hardesty

_______________, J.
Parraguirre

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[14]We have also considered NLRC's arguments that the district court erred in concluding that clay was a mineral covered by the Minerals Leases, which granted Newmont the right to mine clay from the leased lands; that the district court erred in concluding that NLRC's actions had not triggered Newmont's right of first refusal; and that the district court abused its discretion in instructing the jury that lack of a mining permit was irrelevant to mining lease issues. We conclude that NLRC's contentions are without merit.

Given our affirmance, Newmont's cross-appeal is moot.

cc: Hon. Peter I. Breen, District Judge
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Beckley Singleton, Chtd./Las Vegas
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