DA 19-0131

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 276

MINES MANAGEMENT, INC., NEWHI, INC.,
and MONTANORE MINERALS CORP.,

Plaintiffs and Appellants,

v.

TRACIE FUS, LUCILLE PENNY, DESIREE HANN,
WALTER LINDSEY, MERLIN ROGERS, ROCKY BAKIE,
LOUISE VOVES, ESTATE OF ARNOLD BAKIE,
FRANK WALL and LIBBY CREEK VENTURES, L.L.C.,

Defendants and Appellees,

OPTIMA, INC.,

Defendant, Intervenor, and Appellee.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DV-07-248
Honorable Matthew Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

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For Appellee Estate of Arnold Bakie:

Amy N. Guth, Attorney at Law, P.C., Libby, Montana

For Intervenor and Appellee Optima, Inc:

Alan F. McCormick, Katelyn J. Hepburn, Garlington, Lohn
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Submitted on Briefs: October 2, 2019

Decided: November 26, 2019

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Mines Management, Inc. ("MMI"), Newhi, Inc. ("Newhi"), and Montanore Minerals Corp. ("MMC") appeal a March 12, 2013 Nineteenth Judicial District Court order granting summary judgment to Arnold Bakie ("Bakie"), and the District Court's determination that MMI's use of an adit and underground tunnel traversing Appellees' unpatented mining claims constituted trespass. We reverse and remand.

¶2 We restate the issues on appeal as follows:

Issue One: Whether the District Court erred in determining Bakie possessed valid unpatented mining claims, thus entitling him to summary judgment.

Issue Two: Whether the District Court erred in determining MMI's use of the adit and underground tunnel constituted a trespass on Appellees' mining claims.

FACTUAL AND PROCEDURAL BACKGROUND

The Montanore Project

¶3 This dispute concerns MMI's right to access its valid patented mining claims on the Montanore Project, a multibillion-dollar copper and silver deposit within the boundary of the Cabinet Mountain Wilderness ("CMW") in Lincoln and Sanders Counties near Libby, Montana. The Montanore Project is owned by MMI through its subsidiary, MMC.[1] The Project includes two patented lode mining claims, HR 133 and

[1] MMC is a wholly owned subsidiary of Newhi, Inc., itself a wholly owned subsidiary of MMI. Noranda Minerals Corporation ("Noranda") was the project owner until 2006, at which time MMI acquired Noranda and changed Noranda's name to MMC.

134 ("HR Claims"),[2] the Johnstone placer claim, as well as an adit[3] and underground tunnel ("Libby Creek Tunnel").

The Subject Claims

¶4 The Libby Creek Tunnel originates as an adit on the Johnstone Placer claim outside the boundary of the CMW, traversing underground a contiguous block of 1,126 unpatented mining claims, including the four unpatented mining claims at issue in this case, POPS 12, 13, 14, and 15 ("Subject Claims"). These claims are located on approximately 23,000 acres of United States Forest Service land in Lincoln County. MMI is seeking to use the adit and Libby Creek Tunnel to access its HR Claims.

¶5 In 1984, Appellees' predecessors in interest, Ralph Bakie and Dan Reid, filed "blanket" locations of quartz deposits for this entire block of claims with the Lincoln County Clerk and Recorder. The purpose of this blanket filing—covering an entire section with claims—was to block competing locators in an area in case of a mineral discovery.[4] Subsequently, Big John Mining Company ("Big John") and Rodan, Inc. ("Rodan") became record owners of these claims. In 2003, Big John conveyed its interest in the unpatented mining claims to Louise Voves. Voves then conveyed various claims to Tracie Fus, Desiree Hann, Walter Lindsey, and Rocky Bakie. In February

[2] The HR Claims were patented in 2001 when the Bureau of Land Management ("BLM") granted Noranda's patent application.

[3] An adit is an underground mine entry.

[4] In blanket filing, the locator marks a represented "discovery" of a valuable mineral deposit dead center within each of the claims. Lindsey, President of Big John, acknowledged in a deposition he had no records of valuable mineral discoveries on the Subject Claims when they were located.

2008, Arnold Bakie became record owner of the Subject Claims at issue in this case. In October 2013, Bakie conveyed his interest in the Subject Claims by quitclaim to Optima, Inc. ("Optima").

¶6 A major focus of this controversy concerns whether the Subject Claims possess valuable mineral deposits. In April 2008, Bakie and Lindsey filed amended location certificates with the Lincoln County Clerk and BLM for various POPS claims, including the Subject Claims, to correct errors in the original locations of these claims. Bakie testified in a 2008 deposition that he had no knowledge of the manner in which the original locations of the POPS claims were made. Bakie submitted records of quartz deposits on various claims to the trial court, although none of these records indicate the presence of quartz deposits on the Subject Claims at issue. Additionally, Bakie submitted affidavits and assay reports to the District Court purportedly establishing discovery of valuable mineral deposits on the Subject Claims; however, the reports reflect a total of only three discovery points throughout the entire 1,126 claim block, none of which are located on the Subject Claims. Although Bakie originally claimed in an affidavit that an assay he submitted was from a single discovery on POPS 12, he recanted this claim at a 2008 deposition when he clarified that his discoveries were actually on POPS 11 and 24. Bakie further testified that he was unaware of valuable mineral discoveries on any other Subject Claims.

Mining Lease

¶7 In April 1989, the Montana Department of State Lands issued a license and permits to Noranda for construction of the adit and Libby Creek Tunnel to access its HR

Claims. In the same year, Noranda entered a mining lease with Big John and Rodan, then the record owners of the 1,126 unpatented mining claims, for a term of 20 years. In addition, Noranda obtained an easement across the unpatented mining claims.[5] The lease and easement included the right to construct the adit and Libby Creek Tunnel underneath the Subject Claims in order to access its HR claims. Section 5.2(a) of the lease states, "Lessor is the sole legal and equitable owner of a one hundred percent (100%) undivided ownership interest in the Property . . . ." However, the lease itself contains no acknowledgement, warranty, or concession by Noranda regarding the ownership or validity of Lessors' claims. Rather, the lease contemplates that Big John and Rodan may not own an exclusive possessory interest in the Subject Claims. Section 5.7 of the lease provides:

> **Lessor Interest.** If Lessor owns less than the entire and undivided estate in the Property (as warranted in Section 5.2) or in the minerals in, on and underlying the lands covered by the Subject Claims, then all Payments provided for in this Agreement . . . shall be due the Lessor only in the proportion that Lessor's actual interest bears to the entire undivided interest. Lessee shall be entitled to offset all overpayments or monies wrongfully paid to Lessor against any and all subsequent Payments to Lessor.

Similarly, Section 5.10 of the lease acknowledges that lessees may acquire interests that may conflict with the Subject Claims:

> **Acquisition Of Other Property Interests**. Nothing in this Agreement shall be construed to limit Lessee's right to locate on its own behalf, to hold or to acquire or lease from persons or entities other than Lessor, any mining claims, mill sites or other real property interests (including without

[5] Noranda agreed to pay $50,000 with a minimum of $100,000 for three years' work to benefit the leased claims. Additionally, the lease entitled the claim owners to certain royalty payments in exchange for the lease and easement.

> limitation those that may overlap or be in conflict with the Subject Claims), and such mining claims, mill sites or other real property interests shall not be subject to the terms and conditions of this Agreement. Lessee shall not be estopped from asserting the validity or seniority of any such mining claims, mill sites or other real property interests (including without limitation those that may be held by Lessee as of the Effective Date).

Noranda subsequently began construction of the adit and 14,000 feet of the Libby Creek Tunnel, traversing the Subject Claims to a point inside the CMW boundary.

¶8 In 1991, Noranda halted construction of the tunnel due to elevated nitrate concentrations in surface water and depressed mineral prices.[6] In June 2002, Noranda terminated the lease by formal notice, relinquishing its interest in the easement to Big John and Rodan.

Litigation

¶9 In 2006, as a result of Newhi's acquisition of Noranda, MMI assumed the patented Johnstone and HR claims. MMI then proceeded with the Montanore Project and began using the adit for access purposes, engaging in dewatering and rehabilitation activities in preparation for actual mining operations. On September 26, 2007, MMI filed a Complaint in District Court against Bakie and other defendants, seeking a declaratory judgment that the mining claims owned by defendants were invalid.[7] In November 2007, the defendants countersued, alleging that MMI's use of the adit and Libby Creek Tunnel

[6] Notably, relevant federal and state permitting persisted. By 2002, some of Noranda's permits for the Montanore Project expired or terminated, although a Hard Rock permit and Montana Pollutant Discharge Elimination System permit continued.

[7] MMI also sued Bakie and other defendants for various torts, which have since been dismissed.

following termination of the lease constituted a trespass, and sought a declaration that their unpatented mining claims were valid and superior to MMI's.[8] In February 2008, upon his acquisition of interest in the Subject Claims, the court granted Bakie leave to amend his Complaint and join these counterclaims.

¶10 In 2012, the parties filed cross-motions for summary judgment. On March 12, 2013, the District Court granted summary judgment to Bakie and denied MMI's motion. The court determined that the Subject Claims were valid unpatented mining claims because Bakie and his predecessors made valuable mineral discoveries on the Subject Claims, thus providing Bakie with an interest superior to MMI's in those claims. The District Court also concluded that Noranda's abandonment of the lease and easement terminated its interest in the Subject Claims, leaving MMI without access rights to the adit and Libby Creek Tunnel.[9] MMI appealed to the Montana Supreme Court, which refused to consider the interlocutory appeal and remanded the matter for further proceedings on the injunction. *Mines Mgmt. Inc. v. Fus*, No. DA 13-0240, Or. (Mont. Jan. 7, 2014).

[8] These former defendants include those involved in the chain of title of various unpatented claims since MMI's termination of the lease: Tracie Fus, Lucille Penny, Desiree Hann, Walter Lindsey, Merlin Rogers, Rocky Bakie, Louise Voves, Arnold Bakie, Frank Wall, and Libby Creek Ventures. All the defendants save for Frank Wall, Arnold Bakie, and Optima, who joined this lawsuit as a party in 2015, have since settled their counterclaims. On May 8, 2015, the District Court bifurcated the claims pertaining to Frank Wall from these proceedings. Although Wall filed multiple briefs with this Court, because he is not a party to this action we decline to consider his briefs.

[9] Additionally, the District Court granted Lindsey's motion for summary judgment requesting injunctive relief on trespass across his unpatented mining claims.

¶11 On August 15, 2013, MMI filed a new lawsuit in federal district court seeking to condemn the mining claims. The state court stayed this lawsuit until resolution of the federal action. The federal court entered a preliminary condemnation order for an easement, granting MMI access to the subsurface of the Subject Claims and confirming that MMI had a right of access to the Subject Claims under federal law. *Montanore Minerals Corp. v. Easements & Rights of Way*, No. 9:13-CV-00133-DLC, at *22 (D. Mont. April 29, 2014). Additionally, the court acknowledged that MMI possessed a right of reasonable access to its claim over federal land. *Montanore Minerals Corp.* at *9 (D. Mont. April 29, 2014). However, the court declined to award MMI just compensation for condemnation of the easement based on its determination that there was no interference with any valuable mineral deposit. *Montanore Minerals Corp. v. Easements & Rights of Way*, No. 9:13-CV-00133-DLC, at *7 (D. Mont. Aug. 7, 2015). Bakie appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed on grounds that the federal district court should have abstained from jurisdiction until the conclusion of the state court proceeding. *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1170-71 (9th Cir. 2017).

¶12 In March 2015, the District Court ordered the parties to submit reports addressing issues remaining to be tried, noting that it intended to issue a scheduling order for the exclusive purpose of conducting a trial on the tort claims, including trespass. The court ruled that no additional discovery would be permitted unless by agreement of the parties and no motions filed unless requested by the court. In August 2015, the court granted Optima's motion to intervene as a matter of right due to its interest in the Subject Claims.

However, Optima advised the court that no trespass claim was conveyed with its purchase of the Subject Claims.

¶13 On January 8, 2016, MMI moved the court to grant summary judgment based on "new facts and changed circumstances," arguing that Bakie, as holder of the unpatented mining claims, had no ownership interest in the mining claims, that the litigation was controlled by rulings from the federal court, and that Bakie failed to properly file annual reports in 2005. On the same day, MMI moved the court to permit additional discovery and Bakie moved to exclude from trial evidence contradicting the court's prior rulings.

¶14 On May 5, 2016, the District Court issued an order denying MMI's and Bakie's motions to reopen discovery and granting Bakie's motion to exclude from trial evidence intended to prove that the court's 2013 summary judgment ruling was in error. Consequently, the court confirmed that the jury would be instructed that Bakie and Lindsey possessed valid mining claims.

¶15 On October 9, 2018, trial on the remaining claim for trespass commenced. However, following jury selection, opening arguments, and two days of testimony, the court advised the parties that its March 2013 order rendered the case exclusively about damages. The court instructed the jury that MMI was liable for trespass, and the jury was only to determine damages. On December 20, 2018, the jury awarded $2,575,000 to Bakie and $750,000 to Optima. MMI now appeals.

STANDARDS OF REVIEW

¶16 We review a district court's ruling on a motion for summary judgment de novo. *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 338 Mont. 214, 164 P.3d 913. In evaluating a

motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party and all reasonable inferences from the offered evidence are drawn in favor of the opposing party. *Clark v. Eagle Systems, Inc.*, 279 Mont. 279, 284, 927 P.2d 995, 998 (1996). A motion for summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Spinler v. Allen*, 1999 MT 160, ¶ 14, 295 Mont. 139, 983 P.2d 348. Summary judgment is not precluded simply because a nonmoving party interprets facts differently from the moving party. *In re Estate of Prescott*, 2000 MT 200, ¶ 22, 300 Mont. 469, 8 P.3d 88. A district court's determination as to whether the moving party is entitled to judgment as a matter of law is a conclusion of law which we review for correctness. *Hi-Tech Motors, Inc. v. Bombardier Motor Corp. of Am.*, 2005 MT 187, ¶ 32, 328 Mont. 66, 117 P.3d 159.

¶17 We review a district court's evidentiary rulings for an abuse of discretion. *State v. Bonamarte*, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457. A court abuses its discretion if it acts arbitrarily or unreasonably resulting in a substantial injustice. *State v. Sanchez*, 2008 MT 27, ¶ 15, 341 Mont. 240, 177 P.3d 444.

DISCUSSION

¶18 *Issue One: Whether the District Court erred in determining Bakie possessed valid unpatented mining claims, thus entitling him to summary judgment.*

¶19 In granting the 2013 summary judgment for Bakie, the District Court held that Bakie possessed valid unpatented mining claims because he and his predecessors made valuable mineral discoveries on the Subject Claims.

¶20 A claimant with an unpatented mining claim enjoys an exclusive possessory right in the surface of the land and underlying mineral deposits. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37, 83 S. Ct. 379, 382 (1963). In order to have a valid unpatented mining claim there must be the presence of a valuable mineral deposit on that claim. *Tags Realty, LLC v. Runkle*, 2015 MT 166, ¶ 15, 379 Mont. 416, 352 P.3d 616; *Anaconda Co. v. Whittaker*, 188 Mont. 66, 69, 610 P.2d 1177, 1179 (1980). Until such discovery is made, there is no right of possession to any definite portion of the public mineral lands, and a prospector's rights are confined to the ground in his actual possession. *Boscarino v. Gibson*, 207 Mont. 112, 117, 672 P.2d 1119, 1122 (1983).

¶21 Bakie and Optima contend, pursuant to *Boscarino*, that Bakie proved sufficient discovery of valuable mineral deposits on the Subject Claims such that these claims constitute valid unpatented mining claims. According to *Boscarino*, the test of what constitutes a sufficient discovery is that of a prudent man: where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *Boscarino*, 207 Mont. at 117, 672 P.2d at 1122. However, this relaxed prudent man standard only applies as between *rival* claimants. *Boscarino*, 207 Mont. at 117, 672 P.2d at 1122; *Silver Jet Mines v. Schwark*, 210 Mont. 81, 86, 682 P.2d 708, 711 (1984). When the contest is between a mineral locator and another party challenging the mineral nature of the land, the standard is to be more stringently applied, requiring the physical exposure of a valuable vein or lode deposit within the claim boundaries. *Converse v. Udall,* 399 F.2d 616, 619-20 (9th Cir. 1968);

6 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 35.11[3][b] (Cheryl Outerbridge & Margo MacDonnell, eds. 2d ed. 2013).

¶22 Here, MMI is not a rival claimant to the POPS Subject Claims; rather, MMI is seeking to access its own patented HR claims through the adit and Libby Creek Tunnel underlaying the Subject Claims. Had Bakie actually discovered a lode or vein on the Subject Claims, he would have the right to prevent entries on these claims made for the purposes of securing or disposing of these mineral deposits. *Tags Realty*, ¶ 15. However, upon further review of the District Court record, Bakie did not submit *any* evidence to the trial court to support his claim that there had been a discovery of valuable mineral deposits on the Subject Claims. Although Bakie submitted multiple assay reports to the District Court, these reports either fail to indicate which Subject Claims the reports concern or reflect discoveries on claims outside those at issue. Optima maintains in its response brief that an assay report submitted by Bakie reflects mineral discoveries on POPS 12; however, Bakie stated in a 2008 deposition that the assay submitted for POPS 12 was actually for mineral discoveries on POPS 11 and 24. Bakie further acknowledged during his deposition that he was unaware of any other valuable mineral discoveries on the Subject Claims. Finally, while Bakie and Optima rely on the fact that their predecessors in interest made quartz deposit discoveries on various unpatented mining claims in 1984, none of these discoveries occurred on the Subject Claims at issue here. Accordingly, neither Bakie nor his predecessors in interest met the more stringent prudent man standard for the Subject Claims to constitute valid unpatented mining claims.

¶23 Regardless of the presence of valuable mineral deposits, however, the District Court also held that Noranda effectively conceded the validity of the Subject Claims by entering into the lease agreement. Bakie's argument mirrors the District Court's reasoning. Optima, somewhat differently, argues that the lease provides that MMI had no legal right to cross the Subject Claims upon termination of the lease.

¶24 We find these arguments unpersuasive. A condition precedent to claim validity is discovery of valuable mineral deposits, vesting locators with an exclusive possessory interest. *Anaconda Co.*, 188 Mont. at 69, 610 P.2d at 1179. Irrespective of the lease, such discovery has never occurred on the Subject Claims; consequently, Big John and Rodan did not have an exclusive possessory interest to convey.[10] Indeed, the terms of the lease acknowledged as much: Section 5.7 provided that the lessors may not own all that they claim, and Section 5.10 recognized that the lessees may acquire interests that may overlap or be in conflict with the Subject Claims. Contrary to the District Court's holding, the lease is not evidence of the Subject Claims' validity. Rather, the lease effectively served as an insurance policy that had lessors assumed an exclusive possessory interest in the Subject Claims, Noranda could maintain access of its adit and Libby Creek Tunnel without committing trespass.

¶25 Because there were no valuable mineral deposits on the Subject Claims, Bakie did not possess valid unpatented mining claims. Likewise, the lease agreement did not serve to establish the validity of these claims without the presence of valuable mineral deposits.

[10] A basic tenet of property law is *nemo dat quod non habet*—one cannot convey what one does not have.

Accordingly, the District Court erred as a matter of law in granting summary judgment to Bakie.

¶26 *Issue Two: Whether the District Court erred in determining MMI's use of the adit and underground tunnel constituted a trespass on Appellees' mining claims*.

¶27 During the trial, the court advised the parties that its 2013 Order on Pending Motions rendered the case exclusively about damages and instructed the jury that MMI was liable for trespass. The District Court's order provided that Bakie, as a successor in interest to the Subject Claims, vested him with possessory rights in the claims, and that termination of the lease agreement effectively barred MMI from using the Libby Creek Tunnel under or through these claims.

¶28 Trespass is an intrusion on a party's right to exclusive possession of his property. *Tags Realty,* ¶ 15. A claimant with a valid unpatented mining claim enjoys an exclusive possessory right in the surface of his location and the underlying mineral deposits. *Best*, 371 U.S. at 336-37, 83 S. Ct. at 382; *Our Lady of the Rockies, Inc. v. Peterson*, 2008 MT 110, ¶ 3, 342 Mont. 393, 181 P.3d 631. Thus, were there a lode vein, a claimant would have the right to prevent entries on his claim for the purposes of securing or disposing of mineral deposits, and this right is sufficient to maintain a trespass action against anyone seeking to make such an entry. *Tags Realty*, ¶ 15. Before there is evidence of a valuable mineral discovery, however, there can be no right to exclusive possession for which one may bring a trespass claim. *Boscarino*, 207 Mont. at 117, 672 P.2d at 1122. Because neither Bakie, Optima, nor their predecessors in interest demonstrated the existence of

valuable mineral deposits on the Subject Claims, ipso facto, there is no exclusive possessory right to maintain a claim of trespass.

¶29 The District Court erred in determining that MMI committed trespass by using the adit and tunnel underneath the Subject Claims. Because this issue is dispositive of the appeal, we need not address MMI's remaining claims regarding damages argued and whether Optima should have been allowed to pursue a claim of trespass.

CONCLUSION

¶30 The District Court erred as a matter of law in granting summary judgment for Bakie because there was no evidence of valuable mineral deposits on the Subject Claims. For the same reasons, the District Court erred in determining MMI committed trespass by using the adit and Libby Creek Tunnel.

¶31 We reverse and remand to the District Court with instructions to vacate Bakie's 2013 summary judgment and grant MMI's motion for summary judgment.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE