**IN THE COURT OF APPEALS OF IOWA**

No. 9-808 / 09-0327
Filed December 17, 2009

**GARY and LINDA SCHULTE,**
Plaintiffs-Appellees,

**vs.**

**BRIAN and LINDA HARVEY,**
Defendants-Appellants.

---

Appeal from the Iowa District Court for Dubuque County, Bradley J. Harris, Judge.

Brian and Linda Harvey appeal from the district court order denying their claims arising from a real estate transaction. **AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.**

William H. Roemerman of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, for appellants.

Todd J. Locher of Locher & Locher, Farley, for appellees.

Considered by Sackett, C.J., and Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**EISENHAUER, J.**

Brian and Linda Harvey appeal from the district court order denying their claims arising from a real estate transaction. They claim the court erred in refusing to reform the contract and find a breach, in failing to consider the doctrine of merger, in finding Gary and Linda Schulte breached their warranty of title, and in calculating the damages award.

***I. Background Facts and Proceedings.*** The Harveys entered into a contract to purchase a parcel of real estate from the Schultes, intending to move a house onto the lot. When the parties entered into the contract, they were under the belief that sewer and water lines were available close to the lot being purchased. Sometime after the real estate purchase contract signed by the parties, they orally agreed to share the cost of installing a water line.

The Harveys' house was moved onto the site, and the water line installation began. It was during this time the parties learned the water main was not located where they had originally thought. Following extensive negotiations, the parties signed an "Agreement Relating to Water and Sewer" at the real estate closing. The agreement provides the Schultes pay one-half of the cost of extending the waterline through their adjoining property, and the Harveys "be responsible for the installation of the waterline from the City of Dyersville's nearest connection to the new line installed . . . at their sole cost." Ultimately, the Harveys drilled a well on their lot.

Various disputes arose between the parties as a result of the real estate transaction. The Schultes filed various claims against the Harveys and the

Harveys counterclaimed. After trial, the court dismissed all claims and counterclaims and ruled the Harveys owed the Schultes $1912.50 on a promissory note. At issue here is the district court's denial of the Harveys' breach of contract and breach of warranty claims.

***II. Analysis.*** The Harveys contend the real estate contract was induced by a mutual mistake of fact as to the locations of the water main. They argue this mistake of fact warrants reformation of the contract. Once the contract is reformed, the Harveys contend the facts show the Schultes breached the contract. Because this matter was tried in equity, our review is de novo. Iowa R. App. P. 6.907 (2009).

The proper relief for a mutual mistake of a material fact in a written instrument is reformation of the instrument to reflect the true intent of the contracting parties. *Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 289 (Iowa 1975). The Harveys have the burden of establishing a mutual mistake of fact by clear, satisfactory and convincing proof. *See id.*

> Mistakes involving contracts "can be made in the formation, integration, or performance of a contract." Mistake in expression, or integration, occurs when the parties reach an agreement but fail to accurately express it in writing. Mistakes in the formation of contracts include mistakes in an underlying assumption concerning matters relevant to the decision to enter into a contract. In this category of mistake, the agreement was reached and expressed correctly, yet based on a false assumption.

*State ex rel. Palmer v. Unisys Corp*., 637 N.W.2d 142, 151 (Iowa 2001) (citations omitted). When the mistake is in the expression of the contract, the proper remedy is reformation. *Nichols v. City of Evansdale*, 687 N.W.2d 562, 570 (Iowa

2004). When the mistake is in the formation of the contract, on the other hand, avoidance is the proper remedy. *Id.* at 571.

> Specifically, when a mistake of both parties at the time a contract was made as to a basic assumption upon which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.

*Id.*

The Harveys are alleging a mistake in the formation of the contract—the belief that water was available near the property. Such mutual mistake makes the contract voidable by both parties. *See id.* "However, a mutual mistake in the formation of a contract does not render it void; it merely renders it void*able*." *Id.* In the case of a voidable contract, if neither party seeks avoidance, the court cannot void the contract, and the contract remains valid.

Although a mutual mistake of fact existed regarding the location of the nearest water main, neither party voided the contract upon discovery of the mistake. Rather, they sought to modify their purchase agreement to assign responsibility for the cost of extending the water line from the nearest water main. Their agreement is valid. Having found no basis to reform the contract, we likewise find no breach of contract and the denial of the Harveys' breach of contract claim is affirmed.

The Harveys also contend the Schultes breached their warranty of title by failing to deliver a deed without encumbrances. In its ruling, the district court found the agreement to deliver the real estate with clear title was modified by further negotiations between the parties. However, in the deed signed by the

parties, it warrants the property is "free and clear of all liens and encumbrances." Absent any showing to the contrary, a contract for conveyance of real estate is deemed to have merged in a subsequent deed. *Lovlie v. Plumb*, 250 N.W.2d 56, 62 (Iowa 1977). This is true even though the terms and conditions of the deed are not identical to those of the contract. *Id.* In spite of the clear language in the deed to the contrary, the property was delivered subject to a mortgage in favor of Community Savings Bank. Accordingly, the district court erred in finding there was no breach of warranty of title and we reverse this portion of the ruling. As requested by the Harveys, the Schultes shall remove any liens or encumbrances on the property as soon as possible.

Finally, the Harveys contend the district court made a mathematical error in the amount of $200 in calculating the award of damages on the Schultes' breach of contract claim. We modify the award of damages made to the Schultes on their breach of contract claim, finding the remaining due is $1712.50.

**AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.**