State v. Howe Cleaners, Inc., No. 27-1-04 Wncv (Teachout, J., July 17, 2008)

STATE OF VERMONT
WASHINGTON COUNTY

STATE OF VERMONT	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 27-1-04 Wncv**
v.	)	
	)	
HOWE CLEANERS, INC., et al.,	)	
Defendants.	)	

DECISION
TD Banknorth's Motion for Summary Judgment, filed May 2, 2007
Fiore's Motion for Summary Judgment, filed May 12, 2008

In this case as a whole, the State seeks abatement and cleanup costs related to hazardous waste at a property in Barre that was a dry cleaning facility from 1974 to 1996. Defendants include owners before and after 1996. Defendant TD Banknorth's predecessor-in-interest acquired the property in foreclosure and owned it for seven months before selling it to Defendant John H. Fiore, Trustee, (Fiore) who operated it as a pizzeria. Summary judgment has been granted in favor of both TD Banknorth and Fiore on the State's complaint. The present motions involve TD Banknorth's cross claim against Fiore for indemnification.

The deed by which Fiore acquired the property from TD Banknorth's predecessor-in-interest (hereinafter TD Banknorth for simplicity) contains a provision that TD Banknorth characterizes as fully indemnifying it against all pollution-related claims and related defense costs in this case. TD Banknorth and Fiore have filed cross-motions for summary judgment seeking, essentially, an interpretation of the alleged indemnification clause.

Paragraph 14 of the Purchase and Sale Contract (Contract) provided that the conveyance of the property would take place on the following terms:

> 'AS IS, 'WITH ALL FAULTS' with no warranties, express or implied, including fitness for any particular purpose, by Limited Warranty Deed, furnished and paid for by Seller, conveying all of Seller's right, title and

> interest to the real property described in this contract to Buyer, subject to Federal, State, and local codes, safety, zoning, and building laws; rights, easements, reservations, agreements, and restrictions of record, insofar as such are now in force and applicable; delinquent water, sewer and other municipal assessments, and taxes, water, sewer, and other municipal assessments for the current fiscal year, if any.

Contract, ¶ 14. The Contract has an integration clause, providing that it represents the parties' entire agreement, ¶ 22, and any amendments were required to be in writing and signed by both parties, ¶ 23. Plainly, the Contract does not include any agreement to an indemnification obligation.

Other than the disputed language of the deed itself, there is no genuine dispute that Fiore and TD Banknorth never negotiated for nor agreed to an indemnification clause and never attempted, effectively or not, to amend the Contract to include one.

The limited warranty deed itself appears to be unremarkable except for the second-to-last paragraph, which is very long. About the first third of the paragraph lists six specific items for which the grantor makes no warranty. The rest of the paragraph consists of six very long sentences, each beginning, "By acceptance of this deed . . . ." The final such sentence states:

> By acceptance of this deed, Grantee agrees to satisfy all liabilities and obligations of Grantor, whether secured or unsecured, (whether accrued, absolute, contingent, or otherwise) relating to or arising out of the property conveyed hereby (which is conveyed subject to such liabilities and obligations)."

Deed at 2. This is the sentence that TD Banknorth claims provides it with complete indemnification, including defense costs in relation to this case. Fiore accepted delivery of the deed, but did not sign it (as is customary), and did not sign any other document undertaking an indemnification obligation.

The basic standards applicable to deed interpretation are summarized in *Kipp v. Chips Estate*:

> First, in interpreting a deed, we look to the language of the written instrument because it is assumed to declare the intent of the parties. Our "master rule for the construction of deeds is that the intention of the parties, when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement." We read the entire written instrument as a whole, giving "effect to every part" so as to understand the words in the context of the full deed. In so doing, we construe the various clauses of the document, wherever possible, so that the deed has a consistent or harmonious, meaning.

Kipp v. Chips Estate, 169 Vt. 102, 105 (1999) (citations omitted).

As a matter of deed interpretation, the court concludes that the disputed deed language unambiguously does not grant TD Bank the indemnification that it claims. The operative verb at the beginning of the sentence is "to satisfy." In ordinary usage, one "satisfies" an existing debt or obligation, not a future one. See Black's Law Dictionary 1343 (7th ed. 1999) ("Satisfaction differs from performance because it is always something given as a substitute for or equivalent of something else, while performance is the identical thing to be done."). In other words, the reasonable interpretation of this language is that if there were existing liabilities and obligations of the grantor in need of satisfaction (for instance, unpaid property taxes or a water bill), then it was Fiore's obligation to pay them. The provision does not create an obligation with respect to unknown future liabilities and obligations.

This interpretation is reinforced by the reference to "secured or unsecured" liabilities and obligations. Liabilities of TD Banknorth would only be secured or unsecured in relation to the property if they arose while TD Banknorth was the owner of the property (or previously). The second parenthetical at the end of the sentence provides further support: the property "is conveyed subject to such liabilities and obligations." This appears to emphasize that the purpose of the sentence is to assign responsibility for all existing liabilities and obligations related to the property to the grantee. If this were an indemnification provision, the property would be conveyed subject to the right of indemnification, not subject to "such liabilities and obligations."

The disputed deed language purports to assign a set of current liabilities and obligations to Fiore as grantee. It does not purport to provide open-ended indemnification for TD Banknorth against all future liabilities and obligations. The State's claims in this case were not existing liabilities or obligations at the time of the closing, and even if they had been, the express terms do not support assignment of such liability to Fiore, including indemnification.

In any event, interpreting the provision as the indemnification clause that TD Banknorth claims would not change the outcome of the analysis because Fiore would be entitled to have the deed reformed to eliminate an 'indemnification' obligation.

Undisputed facts show that the elements for reformation are present. The facts are that the Contract did not include an indemnification obligation. There was never any negotiation towards such a provision, and there was never any attempt by either party, defective or otherwise, to amend the Contract in this regard. Nothing in the record implies that the deed was to have any terms other than those provided for in the Contract. The deed contains the disputed provision because real estate counsel for TD Banknorth, in drafting the deed, included it only as "standard" deed language. There is no evidence that TD Banknorth relied on the existence of an indemnification clause in proceeding with the sale under the terms of the Contract, or would suffer any prejudice if the deed were reformed.

These circumstances describe a run-of-the-mill "scrivener's error," a form of mutual mistake in the drafting of previously agreed upon terms, entitling Fiore to reformation. See *Ward v. Lyman*, 108 Vt. 464, 470 (1937). The Restatement (Second) of Contracts refers to it as a "mistake as to written expression":

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

Restatement (Second) of Contracts § 155. Such an error warrants reformation even if the party seeking relief failed to exercise reasonable care in reading the instrument before accepting it. See *Ward*, 108 Vt. at 470–71; Restatement § 155 cmt. a.

The record implies, and the court presumes, that, other than the real estate lawyer who prepared the deed, TD Banknorth was unaware of the mistakenly added indemnification provision at the time of the closing. If in fact TD Banknorth was aware of the mistake prior to the closing, the circumstances would no longer describe a mutual mistake falling under Restatement § 155. Instead, the circumstances would describe an act of fraudulent misrepresentation by nondisclosure. See Restatement § 155 cmt. b; *id.* § 166 cmt a. ("The rule stated in this Section also applies to the case where only one party is mistaken and the other, although aware of the mistake, says nothing to correct it.") and illustration 4. A unilateral mistake caused by such a misrepresentation justifies reformation. See *Ward*, 108 Vt. at 471; Restatement § 166.

The doctrine of merger by deed does not supersede the principles of reformation. The doctrine, which has its exceptions, "provides that once a . . . deed is accepted it becomes the final statement of the agreement between the parties and nullifies all provisions of the purchase-and-sale agreement." *Bryan v. Breyer*, 665 A.2d 1020, 1022 (Me. 1995) (quoting *Haronian v. Quattrocchi*, 653 A.2d 729, 730 (R.I. 1995) (internal quotations omitted)). The doctrine is not intended, however, to write all mistakes into stone or to facilitate fraud. "Although agreements respecting the sale of lands are deemed to be merged into a deed subsequently issued, this principle of law does not prevent reformation upon a showing of mutual mistake of fact, a misrepresentation or perpetration of a fraud. Otherwise there could never be a reformation." *Bicknell v. Barnes*, 501 S.W.2d 761, 763 (Ark. 1973).

In this case, if the disputed Contract provision in fact were an indemnification clause, reformation would be appropriate. The standard for reformation would be the Contract itself, which includes no indemnification clause. The alternative, enforcing the indemnification clause, would be unconscionable. The parties never bargained for indemnification; it was merely slipped into the deed gratuitously by the bank's real estate lawyer. According to TD Banknorth, indemnification damages already exceed $100,000 in this case alone—close to the $125,000 Contract price for the property—and Fiore

would have additional liability in the event of any relevant future liabilities of TD Banknorth.

TD Banknorth's arguments in opposition to reformation, and its choice of supporting case law, largely depend on inaccurate characterizations of the facts. This is not a case where there is one contract and Fiore is trying to change its negotiated terms consistently with his subjective impressions of what those terms should be after negligently failing to simply read it. Here, there are two instruments: the Purchase and Sale Contract and the deed. It is undisputed that the Purchase and Sale Contract is the parties' full agreement and did not include an indemnification clause. Nor, despite TD Banknorth's self-serving claims in argument, is there any dispute that the deed is inaccurate in including an 'indemnification' clause. Further, there is no dispute that appearance of the clause arose in the drafting of the deed, not in the negotiation of its substantive terms, and was not known to either party at the closing.

Reformation would return the deed to the terms that both parties intended it to have; it would not make for Fiore a better contract than he bargained for, and it would take nothing from TD Banknorth that it had reasonably anticipated it had bargained for in the Contract.

Order

For the foregoing reasons,

1) TD Banknorth's Motion for Summary Judgment (#32) is *denied*, and

2) Fiore's Motion for Summary Judgment (#54) is *granted*.

Dated this 15th day of July 2008.

_____
Mary Miles Teachout
Superior Court Judge