

*Nolm, LLC v. County of Clark, 100 P.3d 658 (Nev. 2004)*¹

CONTRACTS – PROPERTY DEEDS

Summary

Clark County (“the County”) wanted to sell the remnants of two parcels of land after finishing constructing five lanes at the Desert Inn Arterial. The combined acreage of the two parcels totaled .49 acres.

At a public auction, the County advertised the land under the former legal description, which described the property as being .92 acres. Neil Ohriner, the sole owner of Nolm, LLC, realized the legal property description was incorrect. He then bid on the parcels, winning them for \$340,000.00. The Grant, Bargain, and Sale Deed delivered to escrow likewise incorrectly described the property as .92 acres. After escrow closed, Ohriner subsequently transferred the deed to Nolm.

After the sale, the County taxed Ohriner \$1,050,480.00 on one parcel and \$81,310.00 on the other, taxes based on the full .92 acres. When Ohriner brought the issue of the tax amounts to the County’s attention, he was given two options: either voluntarily reform the deed to describe the appropriate parcel sizes, or rescind the entire contract for the full purchase price plus taxes. Ohriner instead filed a complaint against the County for trespass, inverse condemnation, and private nuisance. The County filed a counter-suit, seeking reformation of the deed, or rescission of the contract, plus attorney’s fees and costs.

The district court considered the fact that although Ohriner was aware before purchasing the property that the legal description was incorrect, he intended to use the County’s error as a “bargaining chip” if the County opposed his application for an adult use permit for the property. The district court ordered Ohriner to reform the contract to reflect the true legal description of the property, .49 acres. Ohriner filed a motion for reconsideration and clarification, arguing that the purchase price and property taxes should have been abated. His motion was denied, after which Ohriner filed an appeal.

Issue and Disposition

Issue

Can a property deed be reformed in favor of a unilaterally mistaken seller who bears the risk of mistake, when the buyer was aware of the mistake and sought to use it against the mistaken party?

¹ By Matt Wagner

Disposition

Yes. The Nevada Supreme Court affirmed the district court decision reforming a land sale contract where one party makes a unilateral mistake that is known to the opposing party and where the opposing party deliberately does not bring it to the mistaken party's attention.

Commentary

State of the Law Prior to *Nolm*

Although it is a case of first impression in Nevada, the *Nolm* decision follows similar holdings of courts in the majority of western states. In addition, the Nevada Supreme Court's holding is also in accord with the applicable provisions of the Restatement (Second) of Contracts.²

Other Jurisdictions

The court notes that most of the western states allow for reformation of a writing where one party makes a unilateral mistake and a party with knowledge of the mistake fails to make the other party aware.³ More specifically, the court examines the principles outlined in several cases regarding the reformation of a contract: equity, gross negligence, and intent.

In an Oregon case, two parties contracted for the sale of real property, having formalized the contract terms in a letter.⁴ Thereafter, one party prepared a formal writing in which the contract terms were different than those outlined in the antecedent letter. The drafting party knew that the new terms were different, knew that the other party could not speak English, and knew that the contracting party relied on the representations of the drafting party as to the contents of the contract. The drafting party, however, did not disclose the new terms. Owing to these circumstances, the Oregon court held that the drafting party's conduct was inequitable and that the contracting party's mistake was not the result of gross negligence.⁵

² With regard to the reformation of a writing to express the terms of the agreement as asserted, the court turned to the commentary in section 166 of the RESTATEMENT which allows reformation when one party is mistaken and the other party, aware of the mistake, remains silent. The party's silence then becomes an assertion that the writing is as the other understands it to be. Similarly, section 161 of the RESTATEMENT provides that a party's silence regarding a fact is tantamount to a declaration that the fact did not exist.

³ *Jones v. Reliable Sec., Inc.*, 29 Kan. App. 2d 617, 28 P.3d 1051, 1062 (Kan. Ct. App. 2001) (written instrument may be reformed where there is ignorance or mistake on one side and fraud or inequitable conduct on the other); *Oftedal v. State ex rel. Transp. Com'n*, 308 Mont. 50, 40 P.3d 349, 352, 359 (Mont. 2002) (allowed reformation of a contract where a contractor had underbid by such an amount that the other party was on notice of the mistaken bid); *Diamond v. Granite Falls School Dist.*, 117 Wn. App. 157, 70 P.3d 966, 971 (Wash. Ct. App. 2003) (where the school district knew of appellant's mistake when the parties entered into a contract, the trial court should have relieved appellant from its unilateral mistake).

⁴ *Kish v. Kustura*, 190 Ore. App 458, 79 P.3d 337 (Or. Ct. App. 2003).

⁵ *Id.* at 465.

In the case at bar, Ohriner admitted that he knew of the County's error in listing the parcels as .92 acres, but remained silent nevertheless. He hoped to take advantage of the County's error. Like the party in the Oregon case, Ohriner's conduct was inequitable.

The County was not grossly negligent in that the land sale was the result of multiple inter-governmental departments attempting to coordinate the transaction. The court sides with the County government asserting that the County department ultimately responsible for the sale was one which had never before conducted such sales. Mere miscommunication between inter-governmental departments, therefore, is not gross negligence.

The intent of the parties to a contract is also an essential element in the case at hand. In *Belk v. Martin*⁶, the Idaho Supreme Court upheld a ruling to reform a lease in which a typographical error, known to one party but not the other, required the payment of ten times the agreed upon lease amount.

In the present action, the County only intended to sell the remnant parcels, but Ohriner, like the knowledgeable party in *Belk*, knew about the written error but failed to bring it to the opposite party's attention.

Effect of *Nolm* on Current Law

The law clearly favors a party without knowledge of a mistake in a contract where the other party has knowledge of the mistake and plans to use it to their benefit in the future.

Conclusion

Where one party is aware of a unilateral mistake in the formation of a contract, and where they deliberately do not notify the other party of the mistake, it is within the power of Nevada courts to reform the contract. The court must take into account elements such as the intent of the parties, whether the knowledge of the mistake places one party in an inequitable position in comparison to the other, and whether a party's lack of knowledge as to the mistake is due to gross negligence.

⁶ 136 Idaho 652, 39 P.3d 592, 599 (Idaho 2001).