

2007-Ohio-5350

**TERRY W. THOMAS, et ux.,
PLAINTIFFS-APPELLANTS,**

v.

**OHIO POWER COMPANY, dba AMERICAN
ELECTRIC POWER, DEFENDANT-APPELLEE.**

No. 06 CA 840

Court of Appeals of Ohio, Seventh District, Carroll

September 27, 2007

Civil Appeal from Common Pleas Court, Case No.
06 CVH 24510.

APPEARANCES:

For Plaintiffs-Appellants: Attorney Lemuel R.
Green

For Defendant-Appellant: Attorney Amy M.
Shortridge Attorney James L. Reeves Ohio Power
Company

JUDGES: Hon. Mary DeGenaro, Gene Donofrio,
Joseph J. Vukovich

OPINION

DeGenaro, P.J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiffs-Appellants, Terry and Deborah Thomas, appeal the decision of the Carroll County Court of Common Pleas that granted judgment to Defendant-Appellee, Ohio Power Company dba American Electric Power, on the Thomases claim for rescission of a contract between themselves and Ohio Edison which granted Ohio Edison an easement on the Thomases' property. The Thomases argue that the parties were mutually mistaken about a material fact when they entered into the contract and, therefore, that the contract should be rescinded. Ohio Edison disagrees and claims that the Thomases failed to plead mutual mistake in their complaint.

{¶2} A review of the complaint indicates that the Thomases pled the facts necessary to state a claim for mutual mistake. Furthermore, the evidence shows that there was a mutual mistake in this case. The purpose of the easement was to provide electric power to the Thomases' neighbor. Both the Thomases and Ohio Power believed Ohio Power could provide electric power to that neighbor, but they were both mistaken about that fact.

Ohio Power was in a better position to know that this belief was mistaken than the Thomases, thus the trial court should have rescinded the contract at the Thomases' request.

{¶3} Accordingly, the trial court's decision is reversed and this case is remanded for a calculation of the Thomases' damages.

Facts

{¶4} The parties in this case stipulated to the facts in the trial court. Those stipulations provided as follows:

{¶5} "1 Plaintiffs are the owners of property in Augusta Township, Carroll County, Ohio. This property is more fully described on the deed, Exhibit 1 hereto, and consists of 159 acres, rectangular in shape, located as shown on the cross-hatched portion of the plat, Exhibit 2 hereto. The northwest corner of the Thomas property is traversed by Meter Road on a diagonal, which is also marked as a thick black line on the plat, Exhibit 2.

{¶6} "2. Property immediately to the east of the Thomas property described above is owned by Brent Baker. Baker's property is outlined in blue pen on the plat thus: // // // // . Until 2005 there was no dwelling located upon the Baker property.

{¶7} "3. The Thomas property is within the geographical area served by Ohio Power Company, dba American Electric Power (hereinafter referred to as 'Ohio Power'). The Baker property is in the service area of Carroll Rural Electric Power (Carroll REA). Neither of those two companies may provide power to the geographical area assigned to the other, without the consent of both companies and the affected customer. The areas served by Ohio Power and Carroll REA are marked in Exhibit 2.

{¶8} "4. During 2005, Brent Baker approached Plaintiff Terry Thomas requesting permission for Ohio Power to take an easement across the Thomas property for the purpose of bringing power lines down to the Meter Road diagonal traversing the Thomas property for the purpose of supplying power to a dwelling house that Baker then contemplated building upon his property. The Thomases consented.

{¶9} "5. As a result of this agreement, an 'Easement and Right-of-Way' was executed on or about June 2, 2005, by Terry and Deborah Thomas. A copy of it is attached as Exhibit 3. That easement has never been amended or cancelled by the action of the parties and is the only bilateral written document bearing upon the rights of the parties in this controversy.

{¶10} "6. In reliance on the rights referred to by the

easement, Exhibit 3, Ohio Power performed the cutting and clearing of many trees which grew upon the Thomas property and overhung Meter Road at the place mentioned.

{¶11} "7. After the cutting and clearing above mentioned, Brent Baker became aware that the dwelling house which he was constructing was not within the Ohio Power service area, but rather within the service area of Carroll REA. That dwelling house was constructed at the location marked 'Baker House' on the attached plat, Exhibit 2. Ohio Power was advised or otherwise became aware, of the fact that the Baker residence was within the Carroll REA service area; and Ohio Power attempted to but was not successful in obtaining permission from Carroll REA to provide service in that location.

{¶12} "8. Ohio Power's practice in the planning and location of power lines is to locate or relocate them, where possible, along existing roadways for ease of access and improved reliability of service."

{¶13} On January 3, 2006, the Thomases brought suit against American Electric Power, seeking both rescission of the easement contract and damages. American Electric answered on January 30, 2006. On May 18, 2006, the trial court corrected the defendant's name to Ohio Power Company, dba American Electric Power. The parties then filed the above stipulations on May 19, 2006, and filed briefs on the issue of whether the easement contract should be rescinded. On August 26, 2006, the trial court concluded that the easement was valid and, therefore, not subject to rescission. Ohio Power moved for summary judgment on the remaining issues on October 18, 2006. The Thomases did not respond to this motion and the trial court granted Ohio Power's motion on November 17, 2006.

{¶14} On appeal, the Thomases' sole assignment of error argues:

{¶15} "The trial court erred in not holding invalid an easement that was granted by Appellant because of a mutual mistake of the parties, when the facts which established the relevance and mutuality of the mistake were stipulated by the parties."

{¶16} The Thomases argue that the trial court erred by not rescinding the contract between themselves and Ohio Power because of a mutual mistake of fact. Ohio Power contends that the Thomases did not raise this claim in their complaint and, therefore, the trial court did not err when it did not find that there was a mutual mistake. Moreover, it contends that there was not actually a mutual mistake in this case and, therefore, no grounds for rescinding the contract. We will address Ohio Power's procedural argument before addressing the arguments concerning the merits of the mutual mistake claim.

Pleading Mutual Mistake

{¶17} Civ.R. 8(A) states that a party states a claim for relief if the complaint contains "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." A complaint alleges the elements of the claim with sufficient particularity if it gives reasonable notice of the claim to opposing parties. *In re Election Contest of Democratic Primary Held May 4, 1999 for Clerk, Youngstown Mun. Court*, 87 Ohio St.3d 118, 120, 1999-Ohio-0302. In other words, Ohio is a notice pleading, rather than a fact pleading, jurisdiction. Id.

{¶18} As the dissent points out, Civ.R. 9(B) requires that mistake must be pled with particularity. However, when discussing whether the complaint alleged mistake with particularity, the dissent fails to acknowledge that the contract for an easement was attached to the complaint and incorporated into the complaint in paragraph 2. A contract which is attached to the complaint and incorporated therein is considered part of the complaint. See Civ.R. 10(C); *A.H. Sturgill Roofing, Inc. v. Robert W. Setterlin & Sons Co.*, 171 Ohio App.3d 241, 2007-Ohio-2020, at ¶10. The contract clearly states that it is providing Ohio Power with "all necessary and convenient rights" to provide "electric, other energy or communications purposes." Paragraph four of the complaint alleges that it is not necessary or convenient to provide those services. The Thomases' allegations, when read with the attached contract, are sufficient to plead mutual mistake.

{¶19} Furthermore, courts have held that "Civ.R. 9(B) should not be strictly applied, even where pleadings are vague, as long as the defendant has notice of the matters about which the plaintiff complains." *Butler Cty. Bd. of Commrs. v. Hamilton* (2001), 145 Ohio App.3d 454, 471. Fundamentally, the general principle governing pleadings remains, they must give "fair notice of the nature of the action." *DeVore v. Mutual of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38.

{¶20} In this case, Ohio Power has never argued that it was in any way confused about the arguments that the Thomases are making or the mistake which the Thomases allege. Since Ohio Power has never claimed that it was not on notice about the nature of the mistake which the Thomases alleged in their complaint, we cannot conclude that the Thomases have waived their right to pursue this claim. We reject Ohio's Power's argument to the contrary.

{¶21} The doctrine of mutual mistake is grounds for rescission of a contract if "there is a mutual mistake as to a material part of the contract and where the complainant is not negligent in failing to discover the mistake." *Areawide Home Buyers, Inc. v. Manser*, 7th Dist. No. 04 MA 154, 2005-Ohio-1340, at ¶25, citing *Irwin v. Wilson* (1887), 45 Ohio St. 426. Thus, in order to state a claim for mutual mistake as a basis for rescinding a contract, a

complaint must allege, at a minimum, 1) the existence of a contract; 2) a material mutual mistake by the parties when entering into the contract; and, 3) no negligence in discovering the mistake on the complainant's behalf.

{¶22} The complaint in this case alleges that the Thomases entered into a contract with Ohio Edison to create an easement. It then states:

{¶23} "The said easement and right-of-way agreement was entered into for the purpose of providing electric power service to an adjoining property; but after the clearing of woods was performed it was determined by the defendant that it lacked regulatory or legal authority to provide that service. The clearing of the property was therefore not 'necessary' or 'convenient' for the provision of electric power facilities, inasmuch as such provision of electric power service was either prohibited or unauthorized by pertinent laws and regulations."

{¶24} The complaint then alleges that Ohio Power's actions constituted a trespass, that its actions were reckless, and that those actions damaged the Thomases.

{¶25} We conclude that the complaint alleges all the elements of a claim for rescission of a contract because of mutual mistake. The complaint alleges the existence of a contract. It states that the contract was entered into in order to provide electric power to a neighbor, but Ohio Power could not actually provide electric power to that neighbor, i.e. that the parties were mutually mistaken about Ohio Power's ability to provide electricity to the neighbor at the time the contract was entered into. Finally, the complaint states that the blame for the mistake lies with Ohio Power, rather than the Thomases, since they claim that Ohio Power later determined it could not provide electric power to the neighbor. Accordingly, Ohio Power's procedural attack on the Thomases' claim for rescission due to mutual mistake is meritless. The Thomases' complaint stated a claim for rescission of a contract because of mutual mistake.

Mutual Mistake

{¶26} In this case, the Thomases are seeking a rescission of their contract with Ohio Power. "Rescission is an equitable remedy that invalidates an agreement." *Areawide Home Buyers* at ¶24. As stated above, a court can rescind a contract due to a mutual mistake of the parties if the mistake is in regard to a material part of the contract and where the complainant is not negligent in failing to discover the mistake. Id. at ¶25. "A mistake is material to a contract when it is 'a mistake * * * as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.' 1 Restatement of the Law 2d, Contracts (1981) 385, Mistake, Section 152(1). Thus, the intention of the parties must have been frustrated by the mutual

mistake." *Reilley v. Richards*, 69 Ohio St.3d 352, 353, 1994-Ohio-0528.

{¶27} The trial court concluded that the easement contract did not contain any conditions or limitations on what customers the easement was meant to serve. However, the intention of the parties does not have to be expressed in an agreement in order for that intention to be subject to the doctrine of mutual mistake. The Second District explained why in *Wyse v. Ameritech Corp.*, 2d Dist. No. 20080, 2004-Ohio-1015, at ¶26-30.

{¶28} "The trial court's comments in the present case indicate that the court interpreted the 'intentions of the parties' too narrowly. Specifically, the court felt that so long as Ameritech accomplished its purpose in obtaining an easement, i.e., building a CEV, any mistake was irrelevant. However, an examination of *Reilley* indicates that this is incorrect.

{¶29} "In *Reilley*, the parties signed a real estate purchase contract for property that bordered a stream. The purchaser intended to use the property to build a family home. However, after closing, the purchaser discovered that part of the property was located in a flood hazard area. Because of this, the purchaser's builder said he would not build on the property because he could not warrant the property for one year, consistent with standard building practice. Id. at 353, 632 N.E.2d 507. Neither party knew before closing that the property was in a flood hazard area.

{¶30} "Ultimately, the seller brought suit on the real estate contract, and the purchaser counterclaimed for rescission of the contract. Id. The trial court granted rescission, and the court of appeals reversed. On further appeal, however, the Ohio Supreme Court found that rescission was properly granted. In this regard, the court noted that:

{¶31} "'the lack of knowledge that a significant portion of the lot is located in a floodway is a mistake of fact of both parties that goes to the character of the property such that it severely frustrates the appellant's ability to build a home on the property. Thus, it is a mutual mistake of fact that is material to the subject matter of the contract.' Id. at 353, 632 N.E.2d 507.

{¶32} "In *Reilley*, the seller's intention was to sell the property, which he was successful at doing. If the Ohio Supreme Court had followed the logic of the trial court in the present case, it would have affirmed the judgment in the seller's favor, since the seller's intentions were not frustrated. However, that is not what the court did. Instead, the court considered the subject matter of the contract, and found the mistake material to the subject matter because it severely frustrated the expectations of one party to the agreement. Another way of putting this is that the parties entered into the contract for the purchase of real property knowing that one party intended to build

a home on the site, even though the intention was not expressed in the agreement. When the intention could not be accomplished due to the mutual mistake, the contract was rescinded." Id.

{¶33} In this case, the parties state in their stipulations that the purpose of the easement was to give Ohio Power a right-of-way so it could supply power to the Thomases' neighbor, even though that intention was not reflected in the document granting the easement. The Thomases argue that this purpose was frustrated because of the parties' mistaken belief that Ohio Power could supply electrical power to that neighbor. Ohio Power contends that this was not an impossibility either at the time it entered into the contract or in the future, so the parties could not have been mistaken about its ability to supply electrical power to that neighbor.

{¶34} Ohio Power's argument is meritless. When determining whether a mutual mistake frustrates the purpose of a contract, courts do not look to see whether it is possible to complete the purpose of the contract at some time in the future. Instead, they look to the parties' reasonable expectations absent the mistake. For instance, purpose of the sale in *Reilley* was so the buyers could build a home on the property. The Ohio Supreme Court did not look to the possibility that they could build their home on that property sometime in the future (when the flood hazard issues could be resolved) in order to determine whether the purpose was frustrated. Instead, it looked at the parties' expectations, i.e. that the buyers would be able to build a home on the property in a reasonable amount of time. See also *Wyse* at ¶32 (Looking to the plaintiff's expectations when entering into the contract to determine whether purpose of the contract had been frustrated).

{¶35} In this case, it is clear that the parties expected that Ohio Power would be able to provide electric power to the neighbor when the parties entered into the contract. This was a mistaken belief and that mistake frustrates the purpose of the contract. Accordingly, there is a mutual material mistake in this case.

{¶36} The dissent disagrees and attempts to distinguish *Wyse* and *Reilley* by saying that the mistake in those cases concerned the easement's effect on the property of one of the parties to the contract, while the mistake in this case is in regard to the easement's effect on the property of a third-party to the contract. But *Wyse* and *Reilley* do not say that the doctrine of mutual mistake only applies to the parties' reasonable expectations about how the easement will affect the parties' own property. Instead, they describe the doctrine as applying when the purpose of the contract has been frustrated. The fact that the purposes of the contracts in those cases are different than the purpose of the contract in this case does not mean that the principle espoused in those cases does not

apply here.

{¶37} Ohio Power does not claim that the Thomases were negligent in discovering this mistake. Moreover, the equities of this situation show that Ohio Power, as the company in the business of providing electric power, was in a much better position than the Thomases to discover the mistake.

{¶38} In conclusion, the trial court erred when it refused to rescind the easement due to a mutual mistake of the parties. The purpose for entering the contract was to provide electric power to the Thomases' neighbor. Both parties to the contract believed that Ohio Power could provide the neighbor with electric power. However, that belief was mistaken. Furthermore, Ohio Power, rather than the Thomases, was in the best position to know this mistaken fact when the parties entered into the contract.

{¶39} For the above reasons, the Thomases' sole assignment of error is meritorious. Accordingly, the judgment of the trial court is reversed and this case is remanded for a determination of damages.

Donofrio, J., concurs.

Vukovich, J., dissents, see dissenting opinion.

DISSENTING

VUKOVICH, J.

{¶40} I respectively dissent from the decision reached by my colleagues. There was no mutual mistake, and thus, the contract for the easement should not be rescinded. Consequently, I would affirm the judgment of the trial court.

{¶41} Two issues are raised in this appeal. The first is whether Thomas sufficiently pled mutual mistake in the complaint. The second issue is if mutual mistake was sufficiently pled, was there a mutual mistake of a material fact?

{¶42} Regarding the first issue, the majority cites to Civ.R. 8(A) and explains that all that is required is a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment. Opinion ¶17. It then states that in order to state a claim for mutual mistake, the complaint must allege: 1) the existence of a contract; 2) a material mutual mistake by the parties when entering into the contract; and 3) no negligence in discovering the mistake on the complainant's behalf. Opinion ¶19. After reviewing the complaint, the majority concludes that mutual mistake was sufficiently pled. Opinion ¶23.

{¶43} The majority's recitation of the elements of mutual mistake is correct; however, the majority's analysis as to whether the complaint was sufficiently pled

is incomplete. The majority fails to acknowledge that mistake, like fraud, must be pled with particularity. Civ.R. 9(B). *Butler Cty. Bd. of Commrs. v. Hamilton* (2001), 145 Ohio App.3d 454, 471. Civ.R. 9(B) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, it must be determined whether the complaint was pled with particularity. If the particularity pleading requirement was disregarded, then Thomas waives the right to pursue such cause of action. *Butler Cty. Bd. of Commrs.*, 145 Ohio App.3d at 471, citing *State Sav. Bank v. Gunther (1998)*, 127 Ohio App.3d 338, 346.

{¶44} The complaint alleges that there was a contract for an easement between Ohio Power and Thomas. Paragraph four of the complaint then states:

{¶45} "The said easement and right-of-way agreement was entered into for the purpose of providing electric power service to an adjoining property; but after the clearing of woods was performed it was determined by the defendant that it lacked regulatory or legal authority to provide that service. The clearing of the property was therefore not 'necessary' or 'convenient' for the provision of electric power facilities, inasmuch as such provision of electric power service was either prohibited or unauthorized by pertinent law and regulations."

{¶46} Thomas then alleges that these actions constituted trespass, were performed recklessly and resulted in damage to him. This probably was not sufficient information to be considered to be pled with particularity. As the trial court concluded:

{¶47} "Thus, as *pleaded* in their Complaint, plaintiffs' *sole claim* for the judicial nullification and/or cancellation of the Easement and Right of Way instrument is predicated upon the assertion that 'the clearing of the property was therefore not "necessary" or "convenient" for the provision of electric power facilities.' * * *

{¶48} "Significantly, plaintiffs Thomas do *not* allege in their Complaint that their execution of the easement at issue, or the negotiations between the parties, were the product of fraud, duress, coercion, misrepresentation, mistake, confusion or done other than with an informed, full and complete understanding and acceptance of the content and legal effect of the instrument itself and the grant(s) conveyed therein." 08/25/06 J.E. (Emphasis in Original).

{¶49} The use of the phrase "necessary and convenient" is not an indication that Thomas was alleging mistake. "Necessary and convenient" is a means to determine the scope of an easement when the dimensions of the easement are not expressed. *Hiener v. Kelley* (July 23, 1999), 4th Dist. No. 98CA7. It does not test the

validity of the easement. Consequently, the trial court was correct in determining that the complaint did not plead mutual mistake of material fact.

{¶50} That said, even if it were assumed that the pleadings were pled with particularity and thus, provided notice to Ohio Power that Thomas was asserting a mutual mistake of material fact claim, the facts of this case do not demonstrate mutual mistake of material fact.

{¶51} The stipulated facts in this case show that Baker approached Thomas about granting an easement to Ohio Power to bring power lines across Thomas' property along Meter Road to supply power to Baker's property. Thomas agreed and entered into an easement with Ohio Power. The easement indicates that it is "for electric, other energy or communication purposes, for current/future uses, overhead and underground." The contract further limited the easement to at most eight poles to run the electric. Ohio Power then cleared and cut down trees within the easement to run electric. After that was done, it was discovered that Baker's house was not in the service area of Ohio Power, and thus, Ohio Power could not provide service to Baker.

{¶52} In determining that the above facts resulted in a mutual mistake of material fact, the majority relies on *Wyse v. Ameritech Corp.*, 2d Dist No. 20080, 2004-Ohio-1015.

{¶53} In *Wyse*, Wyse and Ameritech entered into a contract for an easement; Wyse permitted Ameritech to build a controlled environmental vault (CEV) on his property. When discussing the easement, Wyse wanted to ensure that the CEV would not be too obtrusive. Ameritech told Wyse that the CEV would stick out of the ground no more than 36 inches. When Ameritech finally built the CEV, it stuck out of the ground 54 inches. Wyse then brought action against Ameritech for mutual mistake.

{¶54} The Second Appellate District concluded that there was a mutual mistake of a material fact. The parties entered into the agreement under a mistaken understanding of what the visibility and height of the CEV would be when it was installed. *Id.* at ¶31. While that mistake was not particularly material to Ameritech's intention, it was material to Wyse because "it severely frustrated Wyse's expectations" regarding his property. *Id.*

{¶55} The Second District's decision relied on the Ohio Supreme Court's 4-3 reasoning in *Reilley v. Richards*, 69 Ohio St.3d 352, 1994-Ohio-528. In *Reilley*, a buyer contracted with a seller to buy a piece of property. At the time of contracting, the parties were both unaware that the property was in a floodplain. The builder, who was to build the buyer's house, indicated that he would not build on the lot because he could not warrant the property for a year. The Supreme Court held

that this was a mutual mistake of a material fact. It specifically indicated that rescission of the contract was proper since there was a mutual mistake "as to the character of the property, which is material to the subject matter of the contract." Id. at 354.

{¶56} In the instance before us, the mistake is not material because it did not severely frustrate Thomas' expectations regarding his property (the property that was the subject matter of the contract). His expectation regarding his property was that at most eight poles to run electricity could be placed down Meter Road on his property. That was not frustrated by the fact that Baker could not receive power from Ohio Power. His property was not affected; rather, it was Baker's property that was affected.

{¶57} Furthermore, and more importantly, both *Wyse* and *Reilley* involved a mistake of material fact by the *contracting* parties. However, in the matter before this court, the mistake is between the easement grantors and a neighbor whose request induced the grantors to execute the easement. Number 4 of Stipulated Facts. As the trial court correctly pointed out:

{¶58} "The easement contains no conditions or limitations as to when in time the easement can be opened or utilized by Ohio Power nor to what customers, or potential customers, power service will be provided. * * * Utilization of the easement was at Ohio Power's discretion." 08/25/06 J.E.

{¶59} The majority contends that future use cannot be considered. However, I disagree, especially when the contract for easement is for electricity purposes.

{¶60} Accordingly, even if the complaint properly set forth "mutual mistake" with the specificity required by the Civil Rules, there was no mutual mistake of material fact (regarding Thomas' property) between the grantors and the grantee of the easement. As such, I would affirm the trial court's decision.