STATE OF MICHIGAN

COURT OF APPEALS

CHICAGO TITLE INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 242372 Ingham Circuit Court
EAST ARM, L.L.C., Defendant-Appellant.	LC No. 01-093518-CK

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In this appeal, we asked to determine whether a document signed at a closing by the parties to a real estate transaction, which states that the amount of tax proration is a stated sum, which accepts the stated property tax proration figures as satisfactory and which holds harmless the title company which calculated the figures and prepared the document, constitutes an "agreement to the contrary" under MCL 211.2(4) to remove the transaction from the statutory method of calculating the property tax proration. We hold the document in this case does reflect an agreement between the parties and, therefore, the tax proration contained in those documents controls.

Defendant purchased the Hampton Inn hotel in Traverse City from Equity Inns Partnership. The transaction closed on December 16, 1999. Although the parties were represented by counsel, there was no real estate broker involved. The closing itself was handled by The Title Office in Big Rapids.

The purchase agreement provided for the proration of various items, including property taxes. However, it did not specify how the property taxes were to be pro rated. Amy Johnston was the manager of the Big Rapids' branch of The Title Office and handled this transaction. She testified that she inquired of the parties how they wished to handle the proration of the taxes and they instructed her to contact the township and determine how they do it. Johnston testified that she contacted East Bay Township was told that they used the calendar year in arrears method in that area and so Johnston used that method in preparing the settlement statement for closing. After closing, the seller questioned the method used in determining the proration of the property taxes. Plaintiff, which had purchased The Title Office, agreed that the proration had been incorrectly calculated and paid the seller approximately $41,000 to reimburse the seller for

overpaid taxes. Plaintiff then commenced this suit, as the seller's subrogee, against defendant to recover the amount plaintiff believes that defendant underpaid towards taxes.

Plaintiff maintains that, because there was no agreement to the contrary, the statutory method of pro rating taxes found in MCL 211.2(4) should have been employed. Defendant maintains that the tax proration sheets signed as closing constitutes an agreement to the contrary and, therefore, there should be no adjustment to the taxes from how they were in fact pro rated in the closing of this transaction. The trial court concluded that there was a mutual mistake of fact and that there was no agreement to the contrary. The trial court therefore applied the statutory method, granting summary disposition to plaintiff and denying defendant's motion for summary disposition.

We review a grant or denial of summary disposition de novo.[1] In considering a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence offered by the parties in the light most favorable to the nonmoving party.[2] Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[3]

This dispute has its genesis in the fact that the method by which real estate taxes are prorated varies from community to community within the state. Among the methods that are employed are the following:

1) Calendar year method (the method employed at closing in this case). Here, taxes, summer and winter, are treated as covering the calendar year in which they are billed. Thus, in the case at bar, with a closing date of December 16, 1999, the seller was responsible for approximately 11-1/2 months of the taxes billed in 1999, while the buyer (defendant) was responsible for only ½ month of the taxes billed in 1999.

2) Due Date in advance method. Under this method, the taxes are deemed to cover the twelve method period beginning with the date they are billed. Thus, in communities with two tax bills per year (summer and winter), there may have to be two prorations. If this method were applied to the case at bar, the seller would be responsible for approximately 5-1/2 months of the summer taxes billed in 1999 (July 1 to December 16) and ½ month of the winter taxes billed in 1999 (December 1 to December 16). Defendant would thus be responsible for 7-1/2 months of the summer taxes and 11-1/2 months of the winter taxes.

3) Due Date in arrears method. This is the same as due date in advance, except that taxes are treated as covering the twelve-month period before they are billed. Had this method

---

[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] *Id.* at 120.

[3] *Id.*

been applied to this case, the seller would have been obligated to reimburse defendant for 5-1/2 months of the summer taxes billed in 2000 and ½ month of the winter taxes billed in 2000.

4) Fiscal year method. This method is similar to the calendar year method, except that taxes are deemed to cover the services provided for the fiscal year in which they are levied. This method is complicated by the fact that different taxing authorities (school district, county, township, etc.) may have different fiscal years. Thus, different prorations not only apply to winter and summer taxes, but also to each taxing authority. (Indeed, because of different fiscal year starts, it may even be necessary to look at the previous tax bill for one taxing authority and a future tax bill for a different taxing authority.)

Given that there is no single accepted method for prorating property taxes, the Legislature has provided a default method to be employed in the absence of an agreement to the contrary. MCL 211.2(4) provides as follows:

> In a real estate transaction between private parties in the absence of an agreement to the contrary, the seller is responsible for that portion of the annual taxes levied during the 12 months immediately preceding, but not including, the day title passes, from the levy date or dates to, but not including, the day title passes and the buyer is responsible for the remainder of the annual taxes. A used in this subsection, "levy date" means the day on which a general property tax becomes due and payable.

The purported "agreement to the contrary" that defendant looks to in this case are the tax proration sheets prepared by The Title Office in connection with the closing. There are a number of these sheets, which collectively pro rate all of the property taxes and are signed by agents of both the seller and defendant. Each of the sheets contain the following statement:

> We, the undersigned buyers and sellers of the above-captioned property, hereby agree that the prorated taxes charged to the seller/buyer and credited to the seller/buyer at closing are $ _____"

A number appears following the dollar sign on each of the sheets, followed by the calculations. After the calculations and before the signature, the following statement appears:

> We agree that the above calculations are satisfactory and we hold THE TITLE OFFICE, INC, and EMPIRE NATIONAL BANK harmless from any loss or damage resulting from a variance in the tax figures once the actual tax bills are received.

Defendant argues that it is lawful under the statute for a proration agreement to simply be an agreement for a party to pay a fixed sum of money to the other to settle the tax proration and that such an agreement may be signed at any time, including at closing. That is, that a tax proration agreement does not necessarily have to be part of the purchase agreement or otherwise executed before closing. We agree with defendant. The statute does not limit the parties to a real estate transaction to picking from a limited list of proration methods. Thus, the statute does not preclude an "agreement to the contrary" as simply being an agreement for one party to the transaction to pay the other party a fixed amount in consideration of the tax liability. Similarly,

the statute does specify when such an agreement must be executed. Accordingly, there is no basis for rejecting the purported agreement in this case merely because it was signed separately from the purchase agreement or because the proration method is establishing a fixed number rather than explicitly identifying one of the recognized methods of tax proration.

Thus, the question becomes whether the above quoted language from the tax proration sheets represents an agreement on the proration method. We believe that the clear and unambiguous language of the contracts does establish such an agreement. The first part of the language quoted states that the buyer and seller "hereby agree that the prorated taxes" are the amount filled into the blank. We can think of no clearer method to reflect that an agreement exists than to say "we hereby agree."

The trial court rejected defendant's argument, concluding that the parties signed the tax proration sheets under a mutual mistake of fact that the numbers contained in the sheets were accurate. The trial court opined as follows:

> Well, I'm going to deny the Defendant's motion for summary disposition. I'll grant summary disposition for the Plaintiff. The agreement itself in section 6.6 under any column of expense allocations, and I realize this is not definitive, but it says real estate, personal property taxes, which shall be prorated between the seller and the purchaser. Now why do we do that? Because people ordinarily pay the taxes during the time that they are responsible, that they have an ownership interest and this is something that's so commonly – it's a very customary common thought of method of allocation and it's restated even in the statute. It's probably been in the statute for a very long period of time.
>
> Counsel for the Defendant didn't negotiate anything else. There is nothing underlining this transaction that would suggest that there would be some sound reason other than something just generating a document that had the wrong numbers. Those numbers were not negotiated for, they were on the form and the parties signed for them, but there was no discussion, no negotiation, no preliminaries, no letter saying we think you guys ought to pay 11 months of taxes because these negotiations took longer than we thought and we've been burdened, nothing whatsoever of that type. I mean this is a classic in my view mutual mistake of fact. When they signed the document there is nothing here to indicate that they understood – what would be the reason? I mean I haven't heard one single reason offered on behalf of the Defendant why such a number that the Defendant insists as the proper number would have been a part of the transaction. I mean there is no reason. The billing date for that governmental unit is July 1 to June 30th, so there is just no reason that it's even been offered on the part of the Defendant why this particular number, other than the fact that they wrote it down and somebody signed it. It's a classic mutual mistake, mutual mistake of fact. This is not a unilateral fact. It wasn't negotiated for and the proper proration – the date is the date that the statute calls for because no other means of proration -- no means of proration is set forth in any document that I can see. No other number is set forth.

> I find as a matter of fact in law that there is a no "agreement to the contract" in this situation. What you had was a closing document that had a wrong number and they signed it, and they signed it misunderstanding what the situation was in terms of how these taxes would have been billed.

The issue, however, is not whether the parties mistakenly believed that the calculations were accurate. Indeed, it does not appear to be disputed that the tax proration sheets represent the correct proration if the calendar year method is employed.

The trial court erroneously concluded that this case is one of mutual mistake. As the Supreme Court explained in *Lenawee Co Board of Health v Messerly*[4]:

> A contractual mistake "is a belief that is not in accord with the facts". 1 Restatement Contracts, 2d, § 151, p 383. The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed. *Richardson Lumber Co v Hoey*, 219 Mich 643; 189 NW 923 (1922); *Sherwood v Walker*, 66 Mich 568, 580; 33 NW 919 (1887) (Sherwood, J., dissenting).

The *Messerly* Court goes on to say:

> Instead, we think the better-reasoned approach is a case-by-case analysis whereby rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties. *Denton v Utley*, 350 Mich 332; 86 NW2d 537 (1957); *Farhat v Rassey*, 295 Mich 349; 294 NW 707 (1940); *Richardson Lumber Co v Hoey*, 219 Mich 643; 189 NW 923 (1922). 1 Restatement Contracts, 2d, § 152, pp 385-386. [*Messerly, supra* at 29-30.]

Further, in *Dingeman v Reffitt*,[5] this Court considered the remedy of reformation of the contract in light of a mistake:

> Plaintiffs alternatively sought reformation of the land contract. The burden of proof is upon the party seeking reformation to present clear and convincing evidence that the contract should be reformed in order to carry out the true agreement of the parties. *E R Brenner Co v Brooker Engineering Co*, 301 Mich 719, 724; 4 NW2d 71 (1942). In order to decree the reformation of a written instrument on the ground of mistake, the mistake must be mutual and common to both parties to the instrument. *Stevenson v Aalto*, 333 Mich 582, 589; 53 NW2d 382 (1952). If the asserted mutual mistake is with respect to an extrinsic fact, reformation is not allowed, even though the fact is one which would have caused the parties to make a different contract, because courts cannot make a

---

[4] 417 Mich 17, 24; 331 NW2d 203 (1982).

[5] 152 Mich App 350, 358; 393 NW2d 632 (1986).

new contract for the parties. *Brenner, supra*, p 724; *Marshall v Marshall*, 135 Mich App 702, 710-711, n 3; 355 NW2d 661 (1984).

In the case at bar, there is simply no basis for concluding that there was a mutual mistake by the parties regarding the proration of taxes. At best, there was mutual confusion or ignorance as to the method to be applied. The original purchase agreement itself provides that the taxes shall be prorated, but does not provide for which method of proration is to be applied. Further, the closing agent, Amy Johnston, testified in her deposition that when she contacted the parties for instructions on how to calculate the proration, both instructed her to determine how it is done in Grand Traverse County and apply that method. Johnston further testified that she spoke with someone in the East Bay Township treasurer's office and determined that the local practice was to apply the calendar year in arrears method, which Johnston proceeded to do. Ultimately, the parties signed the proration sheets which reflected that they agreed that the sums stated in the sheets were the proper proration amounts. Nothing in the facts of this case reflects a mistake made by the parties. Rather, the parties delegated to Johnston the responsibility of determining the appropriate proration method, she determined that the method which should be applied was calendar year in arrears, and then the parties confirmed in writing their agreement to follow that method. In fact, defendant's president stated in his affidavit that no particular method of tax proration had been discussed in advance, that the proration proposed by Johnston was agreeable to him and he signed the proration sheets intending, without mistake, to accept that as the proration method.

Furthermore, the only "mistake" identified by the trial court was that the number contained in the proration sheets was not the correct number when employing the statutory method. While that is true, that presupposes that the parties were both consciously intending to apply the statutory method and both mistakenly believed that the proration amount calculated by Johnston reflected the statutory method when it did not. Indeed, the trial court's opinion reflects a belief by the trial court that the statutory method is the prevailing method unless there some unique circumstance to agree otherwise. But that assumption by the trial court is not supported by the facts. In her deposition, Johnston testified that there are several different methods of tax proration and, in fact, the calendar year in arrears method is the prevailing method in Big Rapids, where her office is located. Further, Johnston determined upon inquiry that that is also the prevailing method in East Bay Township in Grand Traverse County. Thus, the trial court's belief that there had to have been a mistake was based upon an unjustified assumption.

As to this latter point, plaintiff also argues that Johnston incorrectly determined that the calendar year method is the prevailing method in East Bay Township. But plaintiff points to no evidence that contradicts Johnston's determination. At best, plaintiff shows that the means employed by Johnston to determine the prevailing local method does not create a great deal of confidence in the accuracy of her determination. Plaintiff, however, produces no evidence to establish that that determination is, in fact, inaccurate. But ultimately the point which plaintiff is unable to contradict is that the parties agreed to follow the results obtained by plaintiff, without regard to how she obtained them or whether the results were correct.

In sum, there is no genuine issue of material fact that the parties shared a belief as to the method which was mistakenly applied, nor is there a genuine issue of material fact that the parties agreed in writing to the proration method applied by Johnston. Therefore, the trial court

erred in determining that the statutory method should have been applied in this case. Accordingly, rather than granting summary disposition to plaintiff, the trial court should have granted summary disposition to defendant.

Reversed and remanded to the trial court with instructions to enter summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski