STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-035

Blue Snow, Inc.,

Plaintiff

v.

**DECISION AND ORDER**

Merrill Lee Williams,
Trustee of the Williams Trust,

Defendant

This matter is before the Court on Plaintiff's Motion for Summary Judgment. The case arises out of Defendant's alleged breach of a specific provision (i.e., the payment for electrical services) of the parties' agreement with respect to leased property located in Rockland, Maine. Through its motion, Plaintiff maintains that given the plain language of the parties' written agreement, and given Defendant's acknowledged failure to comply with the terms of the written agreement, Plaintiff is entitled to the entry of summary judgment. Defendant contends that the written contract does not reflect the parties' agreement and, therefore, a material fact exists as to the actual terms of the parties' agreement.

Factual Background

The record evidence establishes that on January 5, 2007, Plaintiff Blue Snow, Inc. (Plaintiff) purchased the business assets of Thorndike Creamery, including its good will, equipment, and store fixtures. The advertisement for the sale of the Thorndike Creamery, which Plaintiff reviewed before the sale, stated that the "Landlord pays all utilities except telephone." On the same day on which Plaintiff purchased the Thorndike Creamery, Plaintiff entered into a written lease agreement with Defendant Merrill Lee Williams, Trustee of the Williams Trust (hereinafter "Defendant"), to lease commercial space located at 385 Main Street, Unit 6, in Rockland, which was the site of Thorndike Creamery prior to the sale.

The parties adopted most of the terms of the lease between Defendant and Thorndike Creamery. However, during the course of the parties' lease negotiations, Marjorie Kinney, Defendant's property manager, amended portions of the prior terms of the lease. Article V, which governed the payment of utilities, was among the amended provisions. That article previously provided that the landlord (i.e., the Defendant) was responsible for the payment of all utility expenses except telephone charges. As revised, the term excluded the expense of cable as well as telephone.[1]

The day before the parties signed the Lease, in an e-mail communication, counsel for Defendant acknowledged that under the Lease as drafted, Defendant would be responsible for electricity. In that same e-mail, in an effort to avoid "surprises", counsel for Defendant inquired whether Plaintiff's business might consume more of the services of a particular utility than did the previous tenant. The parties subsequently executed the Lease, which in addition to the term regarding the payment of utilities, provides that the written agreement "contains the entire agreement of the parties and no representations, inducements, promises or agreements, or otherwise between the parties not embodied herein shall be of any force or effect."

Plaintiff maintains that when it learned that the electric bills for the premises had not been switched into Defendant's name, and that the account remained in the name of the former tenant, Plaintiff arranged for the transfer of the account into its name in order to prevent the ice cream and other food that it had purchased with Thorndike Creamery from spoiling. Plaintiff thereafter submitted the electric bills to Defendant for payment, but Defendant has refused to do so. Plaintiff commenced this action recover the money that it paid for electricity service to the premises. Plaintiff also asks the Court to determine that under the term of the parties' agreement, Defendant is responsible for the electricity payments.

Discussion

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material

[1] Article V, captioned "Utilities," provides: "Landlord shall pay for all utilities consumed or used by Tenant on the premises during the term set forth in Article II, excluding telephone or cable hookup."

fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

As explained above, in this case, Plaintiff contends summary judgment is appropriate because the plain language of the contract obligates Defendant to pay for the electrical service to the leased premises. While interpretation of an ambiguous contract is a question of fact, "[t]he interpretation of an unambiguous contract is a question of law." *Guilford Transp. Indus. v. PUC*, 2000 ME 31, ¶ 13, 746 A.2d 910, 914 (citations omitted). "Contract language is ambiguous when it is reasonably susceptible of different interpretations." *Id.* (citations omitted). Here, neither of the parties appears to argue that Article V or the Lease as a whole is ambiguous. Indeed, a review of the Lease reveals that Article V is in fact plain, unambiguous and susceptible of only one reasonable interpretation.

Because Article V clearly requires Defendant to pay for the electrical service to the leased premises, the issue at this stage of the proceedings is whether the defenses asserted by Defendant have generated an issue of fact for trial. Defendant in large part appears to contend that reformation of the agreement is warranted because the parties entered the agreement under a mutual mistake of fact. Under Maine law, mutual mistake may be grounds for reforming a contract when proved by clear and convincing evidence. *Yaffie v. Lawyers Title Ins. Corp.*, 1998 ME 77, ¶ 8, 710 A.2d 886, 888 (citations omitted). "A mutual mistake is one 'reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instrument.'" *Id.* (quoting *Bryan v. Breyer*, 665 A.2d 1020, 1022 (Me. 1995)). In order for a mutual mistake to warrant reformation, it "must be material to the transaction," and must "touch the subject matter of the bargain and not merely be collateral to it." *Id.* (citations omitted). In this case, if there was in fact a mutual mistake as to responsibility for payment of the electricity service, the mistake would be material to the parties' agreement.

Under the law of mutual mistake, the mistake a party seeking reformation must prove, to a high degree of probability, "is not that the outcome of its agreement differed from its expectations, but rather that the contract language did not express the agreement as originally intended."

*OneBeacon Am. Ins. Co. v. Travelers Indem. Co.*, 465 F.3d 38, 42 (1st Cir. 2006) (citing Restatement (Second) of Contracts § 155 cmt. a (2006)). As one court has explained,

> [t]he distinction is between a contract that does not accurately reflect (hence misrepresents) the agreement of the parties and a contract that accurately reflects the intent of the parties but is premised on some mistaken fact. Reformation is not available to correct mistaken factual assumptions about the parties' bargain, but may be used to correct misrepresentations of the parties' contractual intent.

*Id.*

In this case, Defendant does not dispute that she and her agent, Marjorie Kinney, understood that under the terms of the Lease that Defendant negotiated and signed, Defendant was responsible for the electricity at Thorndike Creamery. Defendant also does not claim that contrary to the explicit terms of the agreement, both parties intended that Plaintiff, rather than Defendant, would be responsible for electricity. At most, there is an assertion by Defendant that she did not realize that by agreeing to pay for electricity, she was agreeing to pay for more than she had under the lease with Plaintiff's predecessor. This assertion, even if proven true, amounts only to a mistaken assumption by Defendant that the terms of her Lease with Plaintiff were the same as the Lease she had with Mr. Kushner. One parties' mistaken assumption does not, and cannot, constitute a mutual mistake of fact as Defendant asserts.

In her attempt to avoid summary judgment, Defendant has also raised the affirmative defense of waiver. "Waiver is the voluntary and knowing relinquishment of a right and may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon." *Dep't of Human Servs. v. Bell*, 1998 ME 123, ¶ 6, 711 A.2d 1292, 1294-95.

Generally, the question of whether a party has waived a particular right is one of fact. *Williams v. Ubaldo*, 670 A.2d 913, 916 (Me. 1996) (citations omitted). Here, Defendant contends that Plaintiff waived its right under the Lease to require Plaintiff to pay the electricity charges. Defendant does not dispute that Plaintiff presented the first electricity bill to Defendant's agent and demanded that Defendant pay it. Likewise, Defendant does not dispute that Plaintiff continued to demand that Defendant pay the electrical bills. Plaintiff's actions after the first electric bill was generated cannot, therefore, be the basis of a successful waiver defense.

However, Defendant's statement of fact establishes for summary judgment purposes that: (1) one week prior to the closing and during the time that the Lease was still being negotiated, one of Plaintiff's corporate officers contacted the electric company and had the account activated in Plaintiff's name; and (2) one week after the closing, that same corporate officer contacted the electric company to report a problem with service and, at that time, again arranged for the account to bear Plaintiff's name. Because Plaintiff's actions in this regard are susceptible of different interpretations, a material dispute of fact exists. That is, a question exists as to whether in arranging for the electric service account to be placed in its name Plaintiff intended to assume responsibility for the account, or whether Plaintiff arranged for the change in order to facilitate receipt of the service and communication with the service provider, or whether Plaintiff requested the change for some other reason (e.g., to prevent the spoliation of product).[2] Because a question of fact exists, Plaintiff is not entitled to judgment as a matter of law.

Conclusion

Based on the foregoing analysis, the Court denies Plaintiff's Motion for Summary Judgment.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 4/29/09

Justice, Maine Business & Consumer Docket

[2] Plaintiff's efforts to change the account name also generates an issue of fact with respect to Defendant's contention that Plaintiff is estopped from insisting upon Defendant's adherence to the express terms of the Lease. Under the doctrine of equitable estoppel in Maine, "a party (1) who is guilty of misrepresentation of existing fact, including concealment, (2) upon which the other party justifiably relies, (3) to his injury, is estopped from denying his utterances or acts to the detriment of the other party." *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales, Inc.*, 1998 ME 53, ¶ 25, 707 A.2d 1311, 1317. At least one unresolved issue is the extent to which Plaintiff's attempt, in the presence of Defendant's agent (Mr. Kushner), to change the name on the account constitutes a misrepresentation (i.e., that Defendant acknowledged responsibility for the electric service charges) upon which Defendant justifiably relied when Defendant did not insist upon different language in the Lease before an bill for electric services was incurred and/or issued.