

POPE et al. v. HOOPES et al.

(Circuit Court, D. New Jersey. January 3, 1898.)

1. CONTRACTS—REFORMATION.

In a suit for reformation of a written contract, the complainant must make out a perfectly clear case, free from doubt.

2. SAME—FAILURE TO CALL IMPORTANT WITNESS.

In such a case, where the testimony is conflicting, the failure of complainant to call as a witness a disinterested person, who was present and took part in the original negotiations, weighs against his claim.

3. EQUITY JURISDICTION—MISTAKE DUE TO NEGLIGENCE.

Against mistake in framing an agreement, caused merely by the negligent conduct of the complaining party, equity will not relieve.

4. SAME—SPECIFIC PERFORMANCE—DECREE.

In a suit for specific performance, the court will not make a decree which would compel the defendant to convey, while leaving the complainant free to reject the deed tendered in compliance with the decree.

5. SAME—EXTENSION OF OPTION.

Where one who holds an option under a contract for the purchase of lands has refused to purchase them upon the agreed terms, the court cannot, in his suit for specific performance, extend the agreed time within which he was to elect whether or not to exercise the option.

This was a suit in equity by Elmer E. Pope and Calvin N. Dodson against William G. Hoopes and others for reformation of a contract and for specific performance thereof.

Harry P. Camden and Chauncy H. Beasley, for complainants.
D. J. Pancoast, for defendants.

KIRKPATRICK, District Judge. In October, 1894, Elmer E. Pope and Calvin N. Dodson, the complainants, entered into an agreement in writing with the defendants, in and by which they leased from the defendants a certain piece of ground in Atlantic City, N. J., for the period of two years, at a rental of \$500 for the first year, and \$600 for the second year, which in the agreement was described as lying on the northerly side of the Board Walk and westerly of Connecticut avenue, and had a frontage of 50 feet on the Board Walk, and of 340 feet on Connecticut avenue. The agreement also provided that the parties of the first part thereto (the defendants herein) would sell to the complainants herein, the parties of the second part, the following described lots of land, situate in said Atlantic City, bounded and described as follows:

"Beginning at a point in the westerly line of Connecticut avenue, five hundred feet south, to the southerly line of Connecticut avenue, and running thence, first, westerly and parallel with Oriental avenue, fifty feet; thence, second, southerly, at right angles to Oriental avenue, between parallel lines, of the width of fifty feet, with the westerly line of Connecticut avenue, for the easterly boundary of the same, to the exterior line of the riparian commissioners, as established in the Atlantic Ocean,—at the expiration of one year from the date thereof, for the sum of fifteen thousand dollars, provided the parties of the first part shall not have sold said property before that time."

It also provided that the parties of the second part might purchase 50 feet on the rear or northerly side of the above-described tract, fronting on Connecticut avenue, with a depth of 175 feet, at

any time during said year, for the sum of \$3,500, provided said lot was not previously sold to other parties. Under this agreement the complainants entered into the possession of the leased premises, and erected thereon a more or less substantial building for exhibition purposes, at a cost of several thousand dollars. On the 6th of September, 1895, the complainants notified the defendants that they would be prepared to accept deeds for the two tracts mentioned in the agreement, and pay the cash price for the same. It was soon discovered that there was a difference between the parties as to the quantity of land to be sold under the contract, the complainants herein insisting that the first tract was to be identical in its location and dimensions with that included within the lease, while the defendants contended that it comprised only that particularly described in the agreement, and which on the line of Connecticut avenue, measuring northerly from the Board Walk, fell short of that described in the lease by upwards of 100 feet. The location of the second tract on which complainants had an option was consequently disputed, inasmuch as it adjoined the first tract on its northerly side. On the 16th September, 1895, and within the year after the date of the agreement, the complainants herein tendered to the defendants the sum of \$18,500, and demanded, for the sum of \$15,000, a deed for a lot having a frontage of 50 feet on the Board Walk, and running northerly 340 feet, and for \$3,500 a deed for a lot adjoining the above on the north, having a frontage of 50 feet on Connecticut avenue, with a depth of 175 feet. The defendants declined to make deeds for the properties demanded, but offered "to convey" to complainants "the property described in said agreement in" their "covenant to convey." This offer of the defendants was refused by the complainants, and on the 8th day of October, 1895, they filed their bill of complaint herein, setting out that by a mistake, unintentional, or intentional and fraudulent, the defendants did not truly describe the premises which they by the agreement had taken the option to purchase, and praying that the agreement be reformed so that the description of the lots to be purchased should conform to the ones they had leased, and that a decree be made compelling the defendants to convey the premises accordingly.

Testimony was taken, from which it appeared that at the time of making the said agreement there were present Elmer E. Pope and Calvin N. Dodson, the complainants, and Allen B. Endicott, William G. Hoopes, and Barclay H. Bullock, the defendants, and a Mr. Rogers, who was then in the employ of Adams & Co., real-estate agents, who were acting for the complainants. Pope and Dodson both testify that the only pieces of ground spoken of at the time of drawing the agreement were the one included in the lease, which was 50 feet front on the Board Walk, by 340 feet deep on Connecticut avenue, and the lot adjoining on the north, having a frontage of 50 feet on Connecticut avenue, by a depth of 175 feet, and that they supposed that the option to purchase covered the same premises which were included in the lease; while Endicott, Hoopes, and Bullock swear that they distinctly refused to sell to the complain-

ants the lot which they were willing to lease, and that they at that time gave complainants as the reason for such refusal that the sale of such a plot would not accord with their general plan of sale of the property of which this lot was a part, and that it would leave upon their hands a large piece of ground which would be inaccessible and practically worthless. They also say that it was because the land to be included in the lease and the land to be sold differed that a separate description was used for each, a more particular description used for the land to be sold, and the beginning point located with reference to a fixed and unchanging monument, the same as had been used by them on that day in making sales of property on that tract to other parties. The testimony of the complainants and defendants is irreconcilable. Mr. Rogers, who both parties agree was present and took part in the negotiations, and at whose suggestion the option on the tract 50x175 was granted and taken, was not called as a witness. It was incumbent upon the complainants to prove that the written instrument did not truly set forth the terms of the agreement, and their failure to give the court the benefit of the testimony of this disinterested witness must work to their disadvantage. Upon the evidence presented, it is impossible for the court to say that the proof in demonstration of a mistake in the description of the land is clear and satisfactory; its weight is rather to the contrary. Upon the one side is the testimony of the complainants; on the other, the written instrument, with its separate description of the land leased and to be sold, fortified by the assertion of the defendants that it was not intended by the parties that the tracts should be identical. In *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 48, the court said: "The writing must be regarded *prima facie* as a solemn and deliberate admission of both parties as to what the terms of the contract actually were;" and he who asks to have a written contract reformed must make out a perfectly clear case, free from doubt. *Hupsch v. Resch*, 45 N. J. Eq. 662, 18 Atl. 372; *Harrison v. Insurance Co.*, 30 Fed. 863. It seems that the difference of description was noticed by Mr. Pope when the agreement was sent to West Virginia, where he resided, for execution. No inquiry was made regarding the matter, but it was, he says, assumed that the option covered the same property as that leased. Against mistake due to negligent conduct the court will not relieve. *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Voorhis v. Murphy*, 26 N. J. Eq. 435.

After the proofs had all been taken, the complainants obtained leave to file an amended or supplementary bill, which, without setting up new matter, asks that the court, if it should find that the complainants were not entitled to a reformation of the description of the lots to be conveyed them by the defendants so as to conform to the description of the lot leased, then the complainants might "be given an opportunity to elect whether they will take the same as described in the option, and, if they do, that the contract" may be specifically enforced in the manner admitted by the defendants. The complainants do not say that they are willing to perform the contract as it has been drawn and executed by them, but

ask the court to give them an opportunity to elect whether at this late day they will exercise the option to purchase which expired in October, 1895, and, if they do so elect, that the court will decree a specific performance. They ask the court to make a decree which would compel the defendants to convey, but leave them at liberty to reject the deed tendered in compliance with the decree. This the court cannot do. The remedy at the time of rendering the decree would not be mutual. In *Richards v. Green*, 23 N. J. Eq. 536, Chief Justice Beasley says: "It seems to me that the rule is universal to this extent: that equity will not direct the performance of the terms of an agreement by the one party when at the time of such order the other party is at liberty to reject the obligations of such agreement." The tender made by the complainants in the exercise of their option was for the tract of land described in the lease. The defendants offered to convey "the property described in said agreement in our covenant to convey." This the complainants refused to accept, saying "that they would not have anything only what the lease and option called for,—the three hundred and fifty feet the building stood on, and the piece fifty by one hundred and seventy-five;" "and we told them," said the witness, "we intended to have all the lease and option called for." Having thus refused to purchase the land according to the terms of the contract, the court cannot make a new agreement for the parties, by extending the time in which they may elect whether they will or will not exercise the option. *Henderson v. Stokes*, 42 N. J. Eq. 588, 8 Atl. 718. The complainants are not entitled to the relief prayed for in the bill, and it should be dismissed, with costs.

BROWN et al. v. CRANBERRY IRON & COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1898.)

No. 243.

REFORMATION OF DEEDS—MISTAKE.

The owners of a tract of mineral land negotiated a sale thereof, but the transaction was suspended because two third persons gave notice that they claimed an interest in the minerals. To clear their title and consummate the sale, the vendors procured deeds from these persons, paying them about \$40,000 therefor. Formerly the two claimants had held their interests in common, but, before execution of the deeds, had, by agreement, partitioned the same. The deeds, however, described the entire tract, and conveyed an undivided one-half of the mineral therein. *Held*, that it was the evident intent of the parties to sell and purchase the entire interest of the claimants, and that the deed should be reformed on the ground of mutual mistake. 82 Fed. 351, affirmed.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This was a suit by W. Vance Brown and others against the Cranberry Iron & Coal Company for partition of certain mineral land. In the circuit court a decree was rendered for defendant, and the complainants have appealed.