

2010

# Wolf Mountain Resorts, L.C., a Utah limited liability company v. ASC Utah, Inc., a Delaware corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WOLF MOUNTAIN RESORTS, L.C., a  
Utah limited liability company,

Plaintiff/Appellant,

v.

ASC UTAH, INC., a Delaware corporation,

Defendant/Appellee

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: Appellate Case No. 20100342-CA  
:  
: Trial Court Case No. 070500485  
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: (ORAL ARGUMENT REQUESTED)  
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**On Appeal from an Order Denying Wolf Mountain's Motion for Summary  
Judgment and Granting ASCU's Cross-Motion for Summary Judgment by the  
Third Judicial District Court, Silver Summit District, Honorable Bruce C. Lubeck**

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REPLY BRIEF OF APPELLANT

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UTAH APPELLATE COURTS**

**JAN - 5 2011**

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## INTRODUCTION

Most lawyers have to stop momentarily and think about who is who when confronting isolated uses of terms like “lessor and lessee” and “mortgagor and mortgagee”. And no doubt mistakes are occasionally made. But no mistake was made here. The very first paragraph of the Leasehold Exception explicitly identifies ASCU as the “Mortgagor” and Wolf Mountain as the “Mortgagee.” Those terms are used 100 times in the Leasehold Mortgage, including 27 times in the due-on-sale provision (paragraph 4(a)).

ASCU’s position is that the parties got it right every time, except for two consecutive instances in the Second Exception. In these two instances, a “scrivener’s error” occurred, says ASCU. The district court accepted this argument and agreed that the Second Exception was the product of a scrivener’s error. (R&O at 16.) Remarkably, the district court reached this conclusion *as a matter of law* even though the scrivener testified that there was no error; he wrote exactly what he intended and what his client wanted. That testimony should have at least created a disputed issue of fact.

Further, the term “scrivener’s error” is misleading. It implies that the mistake was the scrivener’s alone and that ASCU was a passive victim of this alleged mistake. But ASCU had several chances to review the Second Exception, and even suggested several changes. If ASCU did not intend what the Second Exception says, it was grossly negligent in failing to catch what it now claims are “obvious typographical errors”. (Aplee Br. at vi.) If they are so obvious, why did no one catch them at the time when

drafts were going back and forth and changes were being proposed? The answer is that there was no mistake.

### **ARGUMENT**

**A. The district court did not merely apply the rules of contract construction. It applied the affirmative defense of mutual mistake and reformed the contract.**

To appreciate why Wolf Mountain should win this appeal, it is important to understand exactly what the trial court did. ASCU argues on appeal that the trial court did not engage in a reformation analysis based on the doctrine of mutual mistake, “it simply applied the rules of contract construction.” (Aplee Br. at 14.) There is no canon of construction that would allow a court to say that “mortgagee” means “mortgagor”. This was not a question of interpretation; the question was whether there was a mistake. In other words, the question was whether the parties intended something other than the literal interpretation of the Second Exception.

The district court expressly said that it was a mutual mistake. “The court concludes there was not a unilateral mistake here, but a mutual mistake, to the extent that is necessary to accomplish this type of reformation.” (R.316.) The supposed mistake “was that each party twice left in the document the word ‘mortgagee’ and did not note that it should have stated ‘mortgagor’ ....” (R.315.) In other words, the Court found that the contract as written did not conform to the parties’ intent. That is the very definition of a mutual mistake. “Mutual mistake of fact may be defined as error in reducing the concurring intention of the parties to writing.” *RHN Corp. v. Veibell*, 96 P.3d 935, 945 (Utah 2004) (quotation marks omitted).

The district court then held that the remedy for this supposed mistake was to reform the contract. The court explained that it was not engaged in reformation “as that concept is normally meant” (R.314), but was merely making the contract “conform to the parties intent” (R.315). But that is exactly what reformation is, and the district court acknowledged that “this is a type of reformation.” (R.315.) The district court further acknowledged that finding a mutual mistake was “necessary to accomplish this type of reformation.” (R.316.) That is simply another way of saying that if there was not a mutual mistake, the court could not reform the contract.

In short, ASCU is wrong in its argument that “[t]he district court did not ‘reform’ the Leasehold Mortgage ..., it simply applied the rules of contract interpretation.” (Aplee. Br. at 14.) The district court clearly did use the doctrine of mutual mistake to reform the contract to say something other than what its “literal interpretation” would have been. (*Id.* at 10.)

**B. The district court erred in finding as a matter of law that there was a mutual mistake.**

**1. ASCU did not plead mutual mistake with specificity and did not argue mutual mistake. It was error for the district court to sua sponte raise and rely on mutual mistake to defend ASCU’s breach.**

Mutual mistake is a “contractual defense”. *Robinson v. Robinson*, 2010 UT App 96 ¶ 10. This defense must be specifically pleaded or it is waived. *See* Utah R. Civ. P. 9(b); *Neeley v. Kelsch*, 600 P.2d 979, 981 (Utah 1979) (“a party seeking reformation of a deed due to mutual mistake must plead such mistake with particularity”). ASCU did not



plead it with specificity.<sup>1</sup> Nor did ASCU argue or even try to prove to the district court that there was a mutual mistake. The district court itself raised the idea of a mutual mistake and the remedy of reformation. It is error for a district court to *sua sponte* raise and rely on an affirmative defense that has not been pleaded.<sup>2</sup> See *Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003) (“Courts generally lack the ability to raise an affirmative defense *sua sponte*.”); *Finkel v. Romanowicz*, 577 F.3d 79, 88-89 (2d Cir. 2009) (district court committed error by raising affirmative defense not raised by defendant).

And make no mistake, it was used as a *defense* to Wolf Mountain’s claim. Wolf Mountain sued ASCU for breaching the Leasehold Mortgage, and specifically the due-on-sale provision. The default was established. As the district court explained, “The default at issue here is whether ASCU sold its stock or assets. It did beyond dispute. That is an event of default, unless one of the exceptions applies.” (R.311.) ASCU relied on the Second Exception. By its actual terms, however, it only applies to a sale of the “Mortgagee’s interest.” ASCU concedes this: “If read literally, the Second Exception would carve out an exception to default for a transfer of Wolf’s interest in The Canyons

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<sup>1</sup> In its appellate brief, Wolf Mountain states that “ASCU failed to plead ‘mutual mistake’ or even ‘mistake’ as an affirmative defense.” That was incorrect. ASCU’s third defense states, “Plaintiff’s claims are barred by the doctrine of mistake.” And ASCU’s fourth defense states, “Plaintiff’s claims are barred because they are based upon a scrivener’s error.” (Answer at 6.) Nevertheless, the defense is not pleaded with particularity as required by Rule 9(b).

<sup>2</sup> ASCU argues that Wolf Mountain waived this argument by not raising it below. See Aplee Br. at 18 n.7. Wolf Mountain did not have an opportunity to make this argument below. ASCU did not raise the defense of mutual mistake. The trial court raised it *sua sponte*.

....” (Aplee Br. at 11.) Consequently, *unless there was a mistake justifying reformation*, the Second Exception could not excuse ASCU’s default. Wolf Mountain therefore proved its prima facie case. The *only* remaining issues were whether ASCU could rely on the affirmative defense of mutual mistake and, if there was a mistake, whether reformation was justified. ASCU did not specifically plead this defense, and that should have been the end of the question.

**2. The trial court improperly placed the burden on Wolf Mountain to prove the absence of a mistake. ASCU had the burden to prove mutual mistake by clear and convincing evidence.**

But even if the district court properly raised this affirmative defense, the burden of proving mutual mistake should have been placed on ASCU. It was not Wolf Mountain’s burden to prove the absence of a mistake. Yet, the trial court assumed that Wolf Mountain bore the burden. (R.308.) As an affirmative defense, the burden was on ASCU to show the absence of disputed issues of material fact. “[B]ecause courts are reluctant to change contractual obligations and rights . . . , the party seeking reformation must establish the mistake by clear and convincing proof that clinches what might otherwise be only probable to the mind.” *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985) (internal quotation marks omitted).

There are numerous cases in this jurisdiction dealing with reformation of an instrument on the ground of mutual mistake. The guiding criteria are well established. Mutual mistake of fact may be defined as error in reducing the concurring intentions of the parties to writing. Evidence necessary to substantiate the mutual mistake of fact must be clear, definite and convincing, and the party seeking reformation should not be guilty of negligence in the execution of the contract or deed or laches in making timely application for its reformation. This principle has consistently been applied in equity throughout the reformation of instrument cases.

*Naisbitt v. Hodges*, 307 P.2d 620, 623 (Utah 1957).

The trial court therefore erred in placing the burden on Wolf Mountain, and in not considering ASCU's own negligence in the execution of a contract that it now claims contained "obvious typographical errors." (Aplee Br. at vi.)

**3. Extrinsic evidence is admissible to show that there was no mutual mistake, even if the contract is supposedly unambiguous. The district court erred by excluding Wolf Mountain's extrinsic evidence.**

There are different types of mutual mistakes. At issue here is what the Utah Supreme Court has called an "error in the memorialization of an agreement ...." *Guardian State Bank v. Stangl*, 778 P.2d 1, 5 (Utah 1989). There are also different remedies for mutual mistake. The contract may either be rescinded or reformed. *Id.* The Utah Supreme Court has explained the circumstances that justify reformation:

It is the rule in this forum that the power to reform a written instrument by reason of mutual mistake exists under three alternative proofs: (1) that the instrument as made failed to conform to what both parties intended; or (2) that the claiming party was mistaken as to its actual content and the other party, knowing of this mistake, kept silent; or (3) that the claiming party was mistaken as to actual content because of fraudulent affirmative behavior.

*Id.* at 5-6 (quotation marks omitted).<sup>3</sup>

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<sup>3</sup> The latter two circumstances are actually examples of *unilateral* mistakes that justify reformation. See *Brown v. Loveland*, 678 P.2d 292, 295 (Utah 1984) ("[T]he plaintiff must show mutual mistake of the parties or mistake on the part of one and fraud or inequitable conduct on the part of the other, as a result of which the instrument reflects something neither party had intended or agreed to."). In this case, the district court held that there was no unilateral mistake. "This is not a unilateral mistake situation. Even if it is viewed as such, Wolf did not engage in fraud nor remain silent after knowing of ASCU's 'mistake.'" (R.317.)

ASCU alleges and the district court held that the Second Exception in the Leasehold Mortgage did not conform to what the parties intended. But to justify summary judgment in favor of ASCU, ASCU had to prove this by clear and convincing evidence *and also show the absence of disputed issues of material fact*. “To reform a contract, the party claiming mistake must prove that the minds of both parties had been in agreement on a term which they mutually failed to incorporate into the writing.” *Warner v. Sirstins*, 838 P.2d 666, 669 (Utah App. 1992) (internal quotation marks omitted).

When a party to a contract alleges mutual mistake, parol evidence is admissible to show the mistake or the absence of a mistake. *See RHN Corp. v. Veibell*, 96 P.3d 935, 945 (Utah 2004) (quotation marks omitted) (citing 66 Am.Jur.2d *Reformation of Instruments* § 114 (2001) (“[I]n suits to reform written instruments on the ground of fraud or mutual mistake, parol and other extrinsic evidence is admissible ... to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had.”); *Grahn v. Gregory*, 800 P.2d 320, 327 n.8 (Utah App. 1990) (“Mutual mistake is an exception to the general rule that parol evidence may not contradict, vary, or add to a deed.”)).

The district court decided that it did not need to consider extrinsic evidence because the Leasehold Mortgage was unambiguous. But it reached this conclusion only by assuming the mutual mistake. “*If the document did not have those errors*,” the district court reasoned, “it would certainly be unambiguous ....” (R.311 (emphasis added).) After correcting the alleged mistakes, the district court held that the contract was not ambiguous, and therefore it did not need to consider extrinsic evidence of the alleged

mistakes. This circular bootstrapping denied Wolf Mountain the opportunity of showing that there was no mistake.

The district court proceeded backwards. Mutual mistake is about the *content* of a contract. ASCU alleged that the Leasehold Mortgage did not contain the words intended by the parties. Until that question was answered—i.e., until the content of the Leasehold Mortgage was established—it could not be interpreted. And parol evidence is clearly admissible when there is a dispute about whether the words used in a contract are what the parties intended. *See Janke v. Beckstead*, 332 P.2d 933, 934 (Utah 1950). It was patent error for the district court to conclude that there was a mutual mistake without allowing Wolf Mountain to submit extrinsic evidence that there was no mistake.

**4. The scrivener who committed the alleged scrivener’s error testified that it was not a mistake. This creates a disputed issue of fact about the alleged mutual mistake.**

ASCU prepared the initial draft of the Leasehold Mortgage. (R.219.) Wolf Mountain’s attorney, Bradley Rauch, inserted the due-on-sale provision, originally without any exceptions. (R.219.) ASCU deleted the provision. (R.220.) Wolf Mountain reinserted it. (R.220.) ASCU deleted it again and Rauch reinserted it again, this time with the Second Exception exempting a sale of the “Mortgagee’s interest.” (R.221-22.) ASCU made several minor changes to the Second Exception but otherwise accepted the language. (R.223.) Rauch testified:

There was no typographical or scrivener’s error in the final “due-on-sale” clause incorporated into the final Leasehold Mortgage. The Second Exception to the Due-On-Sale Clause was intended to provide Wolf Mountain – the “Mortgagee” – with the right to enter into a joint transaction with ASCU to sell both of their interests in the resort and its

underlying lands to a third party without triggering the Due-On-Sale Clause.

(R.223.)

There is no way, in the face of this testimony, that the district court could conclude as a matter of law that the Second Exception contains a mutual mistake. Mutual mistake requires clear and convincing evidence that “the instrument as made failed to conform to what *both* parties intended ....” *Stangl*, 778 P.2d at 5 (emphasis added). The Leasehold Mortgage says “mortgagee” and the scrivener testified that this was intentional. ASCU contradicts this intention, but that creates a conflict for the factfinder.<sup>4</sup>

In order to say that there was a mutual mistake, the district court had to ignore Rauch’s testimony, but doing so was improper because parol evidence is clearly admissible to disprove a claim of mutual mistake. *See West One Trust Co. v. Morrison*, 861 P.2d 1058, 1061 (Utah App. 1993) (trial court erred by not considering extrinsic evidence of parties’ intent when mutual mistake was alleged). Nor could the district court say that Rauch’s testimony lacked credibility. *See Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984) (when considering a motion for summary judgment “[t]he trial court must not weigh evidence or assess credibility”). Rauch’s testimony creates an obvious issue of fact and should have removed the decision from the court as a matter of law. *See Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983)

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<sup>4</sup> It may be that the parties had differing intentions and were simply talking past each other. That could explain the ostensible inconsistencies, especially those created by language inserted into the Second Exception by ASCU. If that is the case, then the use of the word “mortgagee” was not a mistake on Wolf Mountain’s part, but a unilateral mistake on ASCU’s part that would not justify reformation.

(“A single sworn statement is sufficient to create an issue of fact.”). Disputed facts should have precluded summary judgment in favor of ASCU on the issue of mutual mistake. *See West One Trust Co.*, 861 P.2d at 1062 (court erred in granting summary judgment when there was a claim of mutual mistake and there were disputed issues about the parties’ intent). Without clear and convincing *and undisputed* evidence of a mutual mistake—i.e., that *both* parties intended the contract to say something other than what it says—the district court could not invoke its equitable authority to reform the Leasehold Mortgage.

**5. Alternatively, the Leasehold Mortgage is ambiguous and its interpretation is a question of fact for the factfinder.**

As noted, the district court said that *if* the alleged mistake was corrected, the Leasehold Mortgage would be unambiguous. The mistake could be corrected only if there was undisputed evidence that it was a mistake. As noted, the scrivener testified that there was no mistake. The evidence of a mistake was not undisputed.

ASCU accuses Wolf Mountain of trying to create ambiguity by offering an implausible interpretation of the Second Exception. Wolf Mountain is not offering a competing interpretation. The Leasehold Mortgage says what it says. It is ASCU that offers an interpretation that is inconsistent with the literal meaning. ASCU repeatedly acknowledges that Wolf Mountain’s interpretation is the “literal” one and that *as written* the Leasehold Mortgage is ambiguous:

- “The district court recognized that *strictly as written*, the Leasehold Mortgage led to an absurdity.” (Aplee Br. at 4.)

- “*Read literally*, the Second Exception would mean that a transfer of all or substantially all of Wolf’s rights in The Canyons ... would not give rise to a default under the Leasehold Mortgage ....” (Aplee Br. at 6.)
- “There are multiple other problems with Wolf’s *literal interpretation* of the Due-on-Sale clause in conjunction with the Second Exception.” (Aplee Br. at 10.)
- “If *read literally*, the Second Exception would carve out an exception to default for a transfer of Wolf’s interest in The Canyons—which makes no sense.” (Aplee Br. at 11.)

For the reasons stated in Wolf Mountain’s opening brief, the “literal” interpretation is not nonsensical or absurd, but is consistent with the parties’ intention of creating an exception for a *joint* sale of ASCU’s interests and Wolf Mountain’s interests. If ASCU’s interpretation is also plausible, then the Leasehold Mortgage is ambiguous and the district court could not interpret it as a matter of law. “When ambiguity exists [in a contract], the intent of the parties becomes a question of fact. A motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended.” *WebBank v. Am. General Annuity Service Corp.*, 54 P.3d 1139, 1145 (Utah 2002) (internal quotation marks, citations, and brackets omitted).



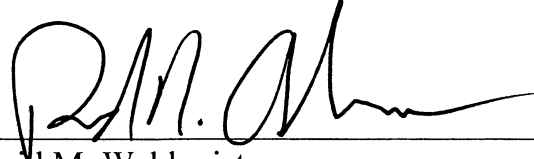
## CONCLUSION

The dispute before this Court is about the content, not the meaning, of the Leasehold Mortgage. Does it say what the parties intended, or was there a mistake in drafting? The Court should not even reach that question. ASCU did not specifically plead and did not argue mutual mistake. It is an affirmative defense and was waived. If the Court reaches the issue, it should find that there are disputed issues of fact. The scrivener who wrote the Second Exception testified that there was no mistake. The trial court improperly ignored that testimony, even though it was clearly admissible and relevant to Wolf Mountain's intentions. ASCU opened the door to such testimony when it alleged that there was a mutual mistake in the Leasehold Mortgage. The district court's approach—find that there was a mutual mistake, reform the contract, then exclude extrinsic evidence because the contract, as reformed, is unambiguous—denied Wolf Mountain the opportunity to show that the contract, as written, conformed to its intentions.

The district court committed legal error in granting ASCU's motion for summary judgment on an affirmative defense that it did not plead with particularity or raise in its briefing. Its decision should be reversed and Wolf Mountain's motion for summary judgment should be granted.

DATED this 5<sup>th</sup> day of January, 2011.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "D.M. Wahlquist", written over a horizontal line.

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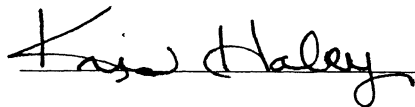
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### CERTIFICATE OF SERVICE

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