The Morning Star Packing Co., L.P., et al. v. Crown Cork & Seal Co. (USA), Inc., No. 06-15110

TRAGER, District Judge, dissenting:

I respectfully dissent.

Although neither party contests that California Fruit was meant to be a party to the agreement, the majority believes that Mabb v. Merriam, 129 Cal. 663, 62 P. 212 (1900), a case decided by the California Supreme Court over a hundred years ago, precludes reforming the Tolling Agreement to add California Fruit as a party. I do not believe that Mabb dictates this unjust outcome. Mabb, in my view, is both distinguishable from the present case and has been undermined by later developments in California law. Subsequent California Supreme Court cases strongly indicate that Mabb would not be decided in the same way today. Mabb is also against the current trend of the law as reflected in the decisions of intermediate California courts, which have been willing to reform contracts in analogous circumstances - often ignoring Mabb's relevance.

More important, however, is that Mabb is now being used to reward conduct by attorneys that, even in the rough and tumble of the business world, would find few supporters. Zealous advocacy on behalf of a client is no excuse for unethical conduct which should not be sanctioned by this Court.

(1)

Crown does not argue that the Tolling Agreement as written reflects the

intent of the parties. Rather, it argues that adding a party who was mistakenly omitted from a contract amounts to making a new contract. Thus, argues Crown, appellants' counsel's drafting mistake cannot be remedied by reformation of the Tolling Agreement to add California Fruit under California law.[1]

California has codified reformation for mistake or fraud:

> WHEN CONTRACT MAY BE REVISED. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

Cal. Civ. Code § 3399 (enacted 1872).

While § 3399 does not permit a court to make a new contract for the parties, it does have the power to reform the writing "to conform with the mutual understanding of the parties at the time they entered into it, if such an understanding exists." Hess v. Ford Motor Co., 27 Cal.4th 516, 524, 117 Cal. Rptr.2d 220, 41 P.3d 46 (2002) (citing Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10 (1951)). In addition, parol evidence is "admissible to show mutual

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[1] Crown emphasizes in its brief that appellants' counsel was responsible for the drafting error, even though the second amended complaint describes the mistake without assigning blame. It is, however, immaterial who wrote the Tolling Agreement, provided all parties mistakenly believed that California Fruit was included in it. See Renshaw v. Happy Valley Water Co., 114 Cal. App. 2d 521, 524-25, 250 P.2d 612 (Cal. Dist. Ct. App. 1952) ("[I]t makes no difference who wrote the instruments to be reformed so long as all parties were in common mistake as to what was contained therein.").

mistake even if the parties intended the writing to be a complete statement of their agreement [because] the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions." Id. at 525.

Despite the broad language of Cal. Civ. Code § 3399, which on its face would clearly permit relief here, the Supreme Court of California in Mabb refused to reform a contract to add a new party or to substitute a new party for one already appearing on the face of the contract. Mabb v. Merriam, 129 Cal. 663, 664, 62 P. 212 (1900).[2]

At the outset, it should be noted Mabb makes no mention of Cal. Civ. Code § 3399, although the statute had been law for more than three decades at the time Mabb was decided. At least one commentator has argued that Mabb and Wilson do not support the broad proposition "that a person cannot be made a party to a contract by reformation," and that "[t]his kind of reformation should be available on the same basis as any other kind." See 5 Witkin Cal. Proc. Plead § 765 (2006).

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[2] In Wilson v. Shea, 194 Cal. 653, 657-58, 229 P. 945 (1924), the California Supreme Court followed Mabb in refusing to allow an action for reformation of a contract to substitute the name of an undisclosed principal for that of his agent. That case, however, is readily distinguishable from the present case. The court there noted that there was no allegation that the other party to the contract knew that the agent was acting on behalf of anyone else when he executed the contract. Id. at 657. In addition, reformation in that circumstance would have worked an injustice against the other party, who could seek recourse against both the agent and undisclosed principal under the unreformed contract but only against the principal under the proposed reformed contract.

Indeed, the California Supreme Court has permitted reformation to correct equally fundamental contract drafting mistakes.[3] Thus, in Oatman v. Niemeyer, 207 Cal. 424, 427, 278 P. 1043 (1929), the court affirmed the judgment of the trial court granting reformation of a deed which mistakenly omitted a description of the real property at issue. The plaintiff had been hired as a nurse and housekeeper, in consideration for which she was to be deeded all of her employer's property upon his death. Her employer had a deed prepared which granted plaintiff "all the certain lot, piece or parcel of land situate, lying and being in the city of Wheatland, County of Yuba, State of California, and bounded and particularly described as follows, to-wit:," but no description of the property followed. The trial court found that the employer owned only one parcel of real property. In reforming the deed to include a description of the property, the court, sitting en banc, noted: "There is no

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[3] The Magistrate Judge found appellants' proposed second amended complaint deficient for failure to plead mistake with particularity, citing Fed. R. Civ. P. 9(b). The proposed second amended complaint alleges that Crown knew that California Fruit was the real party in interest; that it knew that appellants' attorney used the names Morning Star and California Fruit interchangeably in correspondence; and that the purpose of the Non Disclosure Agreement ("NDA") and Tolling Agreement was to allow California Fruit to provide its confidential information to Crown so that the parties could discuss settlement, but due to a mutual or unilateral mistake, known or suspected by Crown, California Fruit was not made a signatory to either the NDA or the Tolling Agreement. These facts, as pled, are sufficient to show that the parties intended to include California Fruit in the NDA and Tolling Agreement, but that it was omitted due to a drafting error. Indeed, it is the rare case that is dismissed with prejudice for failing to plead mistake with particularity. See Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992) (Posner, J.) (finding only two cases in the previous half century in which a complaint was dismissed for failure to plead mistake with particularity and noting the lack of any rationale for the rule). Accordingly, the Magistrate Judge abused his discretion when he denied leave to amend for failure to allege mistake with particularity.

making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect." Id.

Following Oatman, the California Supreme Court allowed reformation of a contract for purchase of real estate to add the amount of a broker's commission and the broker's name. Calhoun v. Downs, 211 Cal. 766, 770, 297 P. 548 (1931). In Calhoun the complaint alleged that the sellers had listed their property with the broker and employed him to sell their property, agreeing to pay him a commission of 5% or $500, and that the broker had found a buyer willing to pay the asking price. Once reduced to writing, however, the agreement mistakenly omitted the broker's name and the amount of the commission, such that the last line of the agreement read: "I agree to pay a commission of $____ to _____." Citing Oatman, the court held that it had the power to reform such a mistake.[4]

More recently, in 2002, the California Supreme Court affirmed the reformation of a settlement agreement to strike certain language where the release, which was made with a different defendant, inadvertently released all other

[4] The Magistrate Judge distinguished Calhoun on the basis that the contract in Calhoun included unfilled blanks, whereas the Tolling Agreement did not. The presence of blanks, however, is simply evidence of the parties' intent to include a commission provision. Had the Tolling Agreement included a blank for California Fruit's representative to sign, the parties' intent to include California Fruit as a party would have been manifest, but the absence of a blank does not negate appellants' claims of intent. This is particularly so here, where Crown does not dispute that the parties intended to include California Fruit in the Tolling Agreement.

tortfeasors from liability. Hess v. Ford Motor Co., 27 Cal.4th 516, 527, 117 Cal. Rptr.2d 220, 41 P.3d 46 (2002).

Although the Oatman, Calhoun, and Hess cases indicate a growing willingness on the part of the California Supreme Court to extend its powers of reformation to remedy fundamental drafting errors in a contract, they do not go so far as to add new parties to contracts. Crown argues that, as a non-party to the contract, California Fruit's intent may not be taken into account for purposes of reformation, and that adding California Fruit as a party would be to make a new contract altogether. However, relief under Cal. Civ. Code § 3399 has not been restricted by California's intermediate appellate courts to the parties named on the contract. In Shupe v. Nelson, 254 Cal. App. 2d 693, 62 Cal. Rptr. 352 (Cal. Ct. App. 1967), the California Court of Appeal held that subsequent purchasers of property had standing to seek reformation of a deed to provide access to a roadway. The court noted that "[t]he right to reformation of an instrument is not restricted to the original parties to the transaction." Id. at 698. Rather, any party "who has suffered prejudice or pecuniary loss" may seek reformation of a contract under Cal. Civ. Code § 3399 as an aggrieved party.[5] Id.

[5] A case with similar facts essentially rejected Mabb. Regency Centers, L.P. v. Civic Partners Vista Village I, LLC, No. G038095, 2008 WL 2358860, at *14 (Cal. Ct. App. June 1, 2008) (unpublished opinion). In Regency, the court held that Mabb is inapplicable since it "did not involve judicial reformation as a result of the parties' mutual mistake or the mistake of one party known or suspected by the other, and did not otherwise analyze Civil Code section 3399."

In addition, Crown's argument that, as a non-party to the Tolling Agreement, California Fruit could not have been party to a "meeting of the minds" ignores the fact that Mr. Rufer, who signed the Tolling Agreement on behalf of Morning Star, also had authority to sign on behalf of California Fruit. The only difference between the Tolling Agreement as drafted and the Tolling Agreement as appellants seek to reform it would be the addition of California Fruit's name as a party and a second signature line for Mr. Rufer to sign, as was the case with the Supply Agreement. Accordingly, California Fruit's intent is relevant and its status as a non-party to the Supply Agreement does not disqualify it from seeking reformation.

In addition, since Mabb, intermediate appellate courts have been quite willing in a number of cases to reform contracts to add or substitute the name of an

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Id. at 14. The court ultimately found that Mabb did not apply to this situation since the agreement was governed by Delaware law. The court further found that even if California law applied, Civil Code Section 3399 allows the contract to be reformed. The case involved an agreement between Civic Partners Vista Village I, LLC ("Civic") and Regency Realty Group (RRG) in which RRG agreed to provide financing and management services for a project, and also received the option to buy out Civic's interest in the project upon the fulfillment of certain conditions. RRG later transferred its interest under the agreement to its affiliate, Regency Centers, L.P. (RCLP). The managing director of RCLP and RRG sent Civic a letter on RCLP letterhead stating: "please allow this correspondence to serve as written notice of RRG's decision to exercise the Option pursuant to Section 14 of the Agreement." Id. at 13. In its analysis, the California Court of Appeal noted that: (1) the parties continued referring to RRG's interest in the company, even after the transfer of the interest to RCLP; (2) Civic never argued that the reference to RRG was a typographical error as concluded by the trial court; and (3) Civic never argued that it did not understand that the notice of intent to exercise the option was on behalf of RCLP.

intended beneficiary, or to otherwise change the parties' insurance coverage to reflect the parties' intent. Am. Surety Co. of New York v. Heise, 136 Cal. App. 2d 689, 694, 289 P.2d 103 (Cal. Dist. Ct. App. 1955) is particularly analogous here, as it makes clear that reformation is permitted to add someone who was intended to be a party to an insurance policy, but was mistakenly omitted. Heise involved an action by a surety company to declare a car insurance policy, naming the father as the sole owner, void from its inception. The son and father sought to reform the insurance policy to include the son as a named insured.

The son and father argued that the insurance policy named only the father as the owner of the car due to either mutual mistake or fraud by the surety company's agent. The son, who was nineteen years old at the time, went to purchase the car, picked out the model he wanted and made a deposit. He was told by the sales manager that because of his age his father, who was not present, would have to sign the sales contract with him. The contract was completely filled out by the car salesman, and the son told the salesman that he was to be the registered owner of the car. In drafting the insurance policy, the surety company's agent took all of the necessary information directly from that contract. The court found that it was the son and father's intention that they be considered as joint owners of the car and that neither the son nor the father made any other representations to the agent. Thus, it was the agent's error that the policy listed the father as the sole owner of the car.

The court, therefore, affirmed the reformation of the insurance policy to include the son as an insured, reasoning that "[t]he minor was the one intended to be protected by the insurance, as well as the father." Heise, 136 Cal. App. 2d at 696. Like the father in Heise who neither purchased the car nor intended on driving it, Morning Star had no interest in any of the cans that Crown was to provide under the Supply Agreement and was only made a party to that agreement to ensure California Fruit's performance. Moreover, like the insurance policy which was only entered into to protect the son, the Tolling Agreement was only entered into to protect California Fruit. Refusing to permit reformation is thus not only unjust, but illogical, as it would mean that the Tolling Agreement served no purpose whatsoever. More relevant to the issue here is that, despite Mabb, the son in Heise was considered by the court to be a party to the insurance contract and not merely a third party beneficiary.

In another case involving insurance policies, Cantlay v. Olds & Stoller Inter-Exchange, 119 Cal. App. 605, 613, 7 P.2d 395 (Cal. Dist. Ct. App. 1932), the California District Court of Appeal affirmed reformation to add individuals who were mistakenly omitted as being covered under the policy. While this case differs from the present case in that Cantlay only sought to change beneficiaries who were not the direct parties, the point is that non-parties to a contract were able to seek reformation. It makes no sense to say that third persons have standing for

reformation while someone who unquestionably was intended to be a party to the contract does not.

In sum, it has been over a century since the Supreme Court of California directly addressed the question of whether a party mistakenly omitted from a contract may be added through reformation, and although Mabb addresses the question squarely, later cases by the Supreme Court of California and the California intermediate appellate courts undermine its authority. The majority opinion acknowledges that "[p]erhaps the law should now be otherwise," but ultimately leaves it up to the California Supreme Court to "dispatch its own opinion to the dustbin of legal history." Maj. Op. at n. 1. In light of the liberal approach taken by California courts in the past half century toward reformation of contracts to correct fundamental drafting mistakes, I do not think that we have to wait until the California Supreme Court explicitly permits the reformation of a contract to add a party to correct the injustice that is occurring here, particularly where the mistaken omission was due to a drafting error and where, as here, the party resisting reformation does not dispute that the omitted party was intended to be included in the contract. At bottom, appellants are not asking the court to make a new contract; they are asking that the Tolling Agreement be reformed to reflect the parties' intent at the time they executed it.

(2)

I turn now to the most disturbing aspect of this case. When the leaders of the law decry the public's low opinion of our profession, and especially its ethics, they should understand that the "gotcha" tactic employed by counsel here provides ample support for the public's belief.

There are two possible explanations for the omission of California Fruit from the Tolling Agreement. Either Crown's lawyer was equally mistaken about the identities of the parties to the Tolling Agreement, in which case Cal. Civ. Code § 3399 allows for the reformation of the mutual mistake, or Crown's lawyer noticed the omission of California Fruit, and chose not to correct the mistake, in violation of his ethical duties. In either case, by trying to capitalize on this error, Crown's counsel did not act in accordance with professional standards.

The ethical obligation of Crown's counsel to represent his client zealously is not his only obligation. As a member of the legal profession, Crown's counsel also has other ethical obligations that, in this instance, required him to point out the mistake. If Crown's counsel noticed the mistake and remained silent, only to use the mistake to Crown's advantage in later litigation, Crown's counsel may have violated its ethical duties. In 1986, the American Bar Association's Committee on Ethics and Professional Responsibility issued Informal Opinion 86-1518, which addresses the very question involved here, namely, a lawyer's duty to apprise opposing counsel of the inadvertent omission of a previously agreed upon contract

provision. The opinion states:

> Where the lawyer for a has received for signature from the lawyer for b the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for b, the lawyer for a, unintentionally advantaged, should contact the lawyer for b to correct the error and need not consult a about the error.
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> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1518 (1986).

The ABA continues:

> The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
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> Id.

The Magistrate Judge's conclusion that "Crown was not compelled to point out California Fruit's omission" is not consistent with these ethics rules, at least insofar as Crown's counsel was involved in the negotiation and execution of the Tolling Agreement. While sharp dealing may be tolerated in business, it does not

conform to the professional norms that govern lawyers - or should. Indeed, I doubt that a businessman who engages in repeated similar conduct would long survive in business. It is hard to believe that, even if Mabb were still good law, the Supreme Court of California would countenance, much less reward, such behavior by a member of its bar.

Accordingly, because the proposed second amended complaint states a viable claim for reformation under California law, the Magistrate Judge erred in denying leave to amend.