COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-470

SALEM FIVE MORTGAGE COMPANY, LLC

vs.

WALTER A. LESTER & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Salem Five Mortgage Company, LLC (Salem Five), loaned defendant Walter A. Lester $300,000 for the purchase of a home on Nantucket, located at 48 Arkansas Avenue. After Salem Five approved the loan, but before the closing date, Walter[2] requested that his wife, Courtney T. Lester, be added to the deed as a tenant by the entirety. Salem Five's mortgage remained solely in Walter's name. As a result, Salem Five advanced funds covering eighty percent of the $375,000 purchase price, but received a security interest only in Walter's undivided interest in the property.

The loan went into default. Salem Five discovered the error and sued for reformation of either the deed or the

[1] Courtney T. Lester.

[2] We use first names to refer to the defendants because they share a last name.

mortgage. After a bench trial conducted over four days, a Land Court judge reformed the mortgage to name Courtney as a borrower. The Lesters appeal. We affirm.[3]

Discussion. A court acting under general equity principles has broad power to "reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake, accident, or illegality." Beaton v. Land Court, 367 Mass. 385, 392 (1975). "As a general rule, reformation of an instrument may be warranted not only by fraud or by mutual mistake, but also by a mistake of one party . . . which is known to the other party . . . ." Torrao v. Cox, 26 Mass. App. Ct. 247, 250 (1988).

In such circumstances, "reformation is justified if the party knowing of the mistake fails to make it known to the mistaken party." Id. at 250. This result "is based on analogy to misrepresentation by silence . . . ." Id. at 250-251. "A party seeking recovery for a unilateral mistake must[, however,] present full, clear, and decisive proof that a mistake occurred

[3] This is the Lesters' second appeal in this matter. The case was originally filed in Superior Court where a judge entered summary judgment for Salem Five. A panel of this court reversed and remanded, holding that the Lesters had established an evidentiary "toehold" as to the question whether Salem Five acted deliberately, instead of mistakenly, in closing the deal. Salem Five Mtge. Co., LLC v. Lester, 90 Mass. App. Ct. 1110 (2016). After remand, the case was transferred to the Land Court where it proceeded to trial.

. . . and that the other party knew or had reason to know of the mistake." Nissan Autos. of Marlborough, Inc. v. Glick, 62 Mass. App. Ct. 302, 306 (2004). "If these conditions are met, a court may choose to reform the agreement at its discretion." Id. at 306.

1. Sufficiency of the evidence. We review the judge's factual findings, including reasonable inferences supported by the evidence, for clear error. See Aggregate Indus. -- Northeast Region, Inc. v. Hugo Key & Sons, Inc., 90 Mass. App. Ct. 146, 149 (2016). See also Nissan, 62 Mass. App. Ct. at 307. The Lesters claim two factual errors in the judge's findings.

First, they argue that the judge erred in finding Walter deliberately took advantage of Salem Five's ignorance of the fact that Courtney was added to the deed. Contrary to the Lesters' argument, this finding is well supported by the judge's subsidiary findings, which in turn are grounded in the trial record.

The judge found that Walter's loan application was filled out by a Salem Five loan officer using information supplied by Walter; the loan application stated that Walter was the only borrower and that title would be held by him, "Individually"; when Walter signed the loan application on June 11, 2008,[4] almost

[4] The judge's decision gives the date as June 11, 2011. This appears to be a typographical error.

two weeks after he requested Courtney be added to the title, he confirmed that the title would be held "Individually"; in signing the loan application, Walter also acknowledged that any misrepresentation on the application could subject him to civil and criminal penalties; the insurance binder Walter obtained in satisfaction of the lender's requirements identified Walter as the only "insured."[5] All of these facts are readily established by the evidence at trial.

In describing Walter's testimony, the judge wrote that Walter suggested "obliquely, without ever saying so directly" that he told the loan officer who filled out the loan application that his intention was that he and Courtney take title jointly, even though the mortgage would encumber only his interest.[6] According to the judge, however, Walter "does not

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[5] The judge also correctly found that Walter is a former Massachusetts-licensed real estate salesperson.

[6] We note that, as a practical matter, the suggestion that the loan officer was aware of Walter's intention to take title with Courtney as a tenant by the entirety strains credulity. Uncontroverted trial testimony indicated it is unlikely a foreclosing mortgagee would be able to sell a partial interest in a tenancy by the entirety at auction. This testimony comports with common sense, considering that a mortgagee's interest in only one spouse's share of a tenancy by the entirety would be subject to the other spouse's right of survivorship. See Coraccio v. Lowell Five Cents Sav. Bank, 415 Mass. 145, 150-151 (1993); Wells Fargo Bank, N.A. v. Comeau, 92 Mass. App. Ct. 462, 463, 467 (2017). Additionally, without the signatures of both spouses, a creditor cannot seize property held as a tenancy by the entirety where it is the principal residence of the nondebtor spouse. Coraccio, supra at 151. See G. L. c. 209,

explain why the loan application, which he signed, and which was filled out with information he provided to [the loan officer] over the telephone, contradicts these assertions. He does not explain why, if the loan application mistakenly listed him as the sole intended owner, he failed to bring this mistake to [the loan officer's] attention." These findings accurately describe the substance of the testimony.

The judge also found that Walter admitted he deliberately misrepresented how he intended to take title by suggesting that others "steered" him to state on the loan application that he would be the sole title holder. The judge pointed out that Walter's testimony was contrary to that of the loan officer, which he credited.[7] The judge's assessment is supported by the record.[8]

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§ 1. And, a tenancy by the entirety is not subject to voluntary partition. See G. L. c. 241, § 1. The Lesters are incorrect insofar as they claim that Walter's debt to Salem Five was "fully secured" by his unilateral execution of the mortgage.

[7] The loan officer testified that there is no chance he would have intentionally misrepresented on the loan application that Walter intended to take title "Individually."

[8] The judge also made credibility and weight determinations, stating, "I found Mr. Lester's testimony to be, in general, purposefully vague on direct examination, and purposefully unresponsive and evasive on cross-examination." See Edinburg v. Edinburg, 22 Mass. App. Ct. 199, 203 (1986), quoting New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675 (1977) ("[T]he judge's assessment of the quality of the testimony is entitled to our considerable respect because 'it is the trial judge who, by virtue of his firsthand view of the presentation of evidence, is in the best position to judge the weight and credibility of the evidence'").

Both the underlying evidence and the judge's subsidiary findings support a reasonable inference based on "full, clear, and decisive proof," Nissan, 62 Mass. App. Ct. at 306, that Walter was aware of Salem Five's ignorance of the fact that Courtney was added to the deed and took advantage of that ignorance to complete the transaction in the way he wished -- with Courtney's interest in the real estate remaining unencumbered.

Second, the Lesters argue that Salem Five failed to show by clear and convincing evidence that it did not intend to accept a mortgage covering only one of two undivided interests in the property. In finding that Salem Five had no such intention, the judge correctly relied on uncontroverted evidence that none of the loan documents revealed that Courtney would take title, with her name appearing only on the deed; Salem Five's loan commitment letter sent to Walter and its "clear to close" letter sent to the closing attorney both indicated Salem Five's understanding that Walter would be the sole owner; Massachusetts residential lenders in general and Salem Five in particular "do not as a rule enter purposefully into loan transactions in which they receive a mortgage that does not fully secure the loan they have made"; Salem Five applies lending guidelines that require a mortgage be signed by all owners of the subject property; at the time of the instant loan there were no home mortgage loan

products available in Massachusetts in which the lender would have accepted a mortgage granted by fewer than all owners; and, a loan secured by a mortgage not signed by all owners is not marketable on the secondary mortgage market. Based on these findings, none of which is clearly erroneous, Salem Five's lack of intent to accept a mortgage signed only by Walter is apparent. As was required, Salem Five proved its case of unilateral mistake by full, clear, and decisive proof.

2. Agency. Next, the Lesters argue that the judge committed legal error, for which we review de novo. Aggregate Indus. -- Northeast Region, Inc., 90 Mass. App. Ct. at 149. They claim that the judge should have found that Salem Five was bound by the knowledge or actions of its closing attorney who, while simultaneously representing both the bank and Walter, instructed the seller's counsel (at Walter's request) that Walter and Courtney would take title as tenants by the entirety.[9] We disagree.

In Torrao, 26 Mass. App. Ct. 247, the plaintiff was not bound by his attorney's decision to close a real estate transaction even though, through discussion at the closing, the attorney could have realized the deed he had prepared included

[9] The closing attorney's e-mail message to the seller's counsel, dated May 29, 2008, states: "I was just informed by my client that he would like to take title to the property at 48 Arkansas Ave. with his wife as tenants by the entirety."

certain land that his client had not intended to sell. Id. at 251-252. "Unlike the broad authority impliedly entrusted to an attorney in the conduct of litigation . . . an attorney's implicit authority in contract dealings is more circumscribed. He has (absent express authorization) no power to bind his principal by his assent to substantial modifications in the contract terms." Id. at 252.

Here, the closing attorney testified expressly that Salem Five did not authorize him to accept only Walter's interest in the property as collateral for the loan. He also testified that, generally, a closing attorney is not authorized to make lending decisions. A Salem Five senior vice president of mortgage operations testified that the closing attorney was not authorized to accept less than a full interest in the property.

Thus, as in Torrao, the evidence here showed that the closing attorney "[was] not authorized to assent to the modification of the original agreement that through mistake . . . found its way into" the transaction by virtue of the non-matching mortgage and deed, and "[h]is assent did not bind the plaintiff." Id. at 252.

To be sure, as a general proposition, knowledge of an agent gained in the course of a transaction may be imputed to the agent's principal, see Bockser v. Dorchester Mut. Fire Ins. Co., 327 Mass. 473, 477-478 (1951). A court's broad power to reform

instruments is, however, equitable in nature. Beaton, 367 Mass. at 392. The general rule on notice to agents simply does not account for the equities here, where there can be no reasonable dispute that an error occurred, and where the evidence showed that one party was aware of that mistake and benefited from it while the other was not and did not.[10] To hold otherwise in this case would effectively grant the closing attorney more authority than Salem Five ever intended -- i.e., the power to change substantively the deal to which Salem Five and Walter had agreed.

3. Waiver. The Lesters argue that the judge's decision cannot stand because Salem Five's complaint only pleaded a mutual mistake, and not a unilateral mistake as found by the judge. We disagree. Salem Five's pleading sought reformation of the deed or the mortgage. As discussed above, the judge was empowered as a matter of equity to reform the mortgage on the facts found at trial. To the extent Salem Five's complaint assumed a mutual mistake rather than accusing Walter of intentional conduct, Walter cannot benefit now from the fact

[10] Here, the attorney provided an affidavit stating, "I did not consciously decide to accept less than one hundred percent of the mortgage title in the property." The implication is that the attorney simply did not realize the problem caused by his honoring Walter's request that Courtney be added to the deed. Under these circumstances, it would be unfair and inequitable to impute the attorney's knowledge to Salem Five.

that Salem Five's initial pleading was more generous to him than the judge's ultimate findings.[11] See Jensen v. Daniels, 57 Mass. App. Ct. 811, 815 n.11 (2003) (precise legal theory need not be stated in pleading so long as there is notice of theory prior to trial).

4. Ratification. Finally, the Lesters argue the judge erred in failing to find Salem Five ratified the closing attorney's conduct in closing the loan with full knowledge that Courtney was taking title. As a threshold matter, we agree with the Lesters that their ratification argument is not waived, even though this theory was not included in their affirmative defenses or counterclaims.[12] See Mass. R. Civ. P. 8 (c), 365 Mass. 749 (1974). In Salem Five Mtge. Co., LLC v. Lester, 90 Mass. App. Ct. 1110 (2016), a panel of this court mentioned the Lesters' ratification defense in its third footnote. Plainly, Salem Five was on notice of the Lesters' ratification claim at some point prior to that October 2016 decision. The trial in this case did not proceed until June 2017. Accordingly, the

[11] Salem Five's complaint does not accuse Walter of intentional misrepresentation or any other type of fraudulent intent. It cites "mutual mistake" as a basis for reformation. The trial testimony, however, convinced the judge that the unilateral mistake occurring here was "a result, at least in part, of Mr. Lester's intentional misrepresentations to Salem Five as to how he intended to take title."

[12] The Lesters voluntarily dismissed their counterclaims early in the litigation.

defense was not waived. See Demoulas v. Demoulas, 428 Mass. 555, 575 n.16 (1998); Bendetson v. Building Inspector of Revere, 36 Mass. App. Ct. 615, 620 n.9 (1994).

Although the judge found the Lesters had waived their ratification defense, he went on to find, on the merits of the argument, that Salem Five's conduct "did not constitute a ratification of the unauthorized act of its agent in accepting and recording the deed with Courtney Lester as an additional grantee." In so doing, the judge wrote, "notwithstanding the fact that the deed with the unauthorized additional grantee was in Salem Five's possession immediately following the June 13, 2008, closing, I accept and credit the testimony of Salem Five's representatives that Salem Five did not discover the error until the loan went into default in 2012."

Although "we scrutinize without deference the legal standard that the judge applied to the facts . . . ," "ratification is essentially a question of fact that will be reversed only if clearly erroneous," Diep Bui v. Ha Ma, 62 Mass. App. Ct. 553, 565 (2004). "A principal may be bound by an agent's unauthorized acts if the principal expressly or impliedly ratifies the agent's acts." Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 528 (2008). "Ratification may be effected by the principal's express declaration or inferred from his actions, including failure to repudiate an act." Id.

at 529. "In order to establish ratification it generally must be shown that the principal had 'full knowledge of all material facts.'" Id., quoting Perkins v. Rich, 11 Mass. App. Ct. 317, 322 (1981). See Murray v. C.N. Nelson Lumber Co., 143 Mass. 250, 251 (1887). "However, the law does not allow one to 'purposefully shut his eyes to means of information within his own possession and control, having only that knowledge which he cares to have.'" Colony of Wellfleet, Inc., supra, quoting Perkins, 11 Mass. App. Ct. at 322.

Importantly, "[r]atification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal." Brown v. Henry, 172 Mass. 559, 567 (1899), quoting Combs v. Scott, 12 Allen 493, 497 (1866). "Ordinarily, ratification of an agent's act is a mere matter of intention." Brown, supra at 568. "There is a class of cases in which the principal receives a direct benefit from an act of an agent, and it is held that, if he retains this benefit for a considerable time after he obtains full knowledge of the transaction, he thereby ratifies the act." Id.

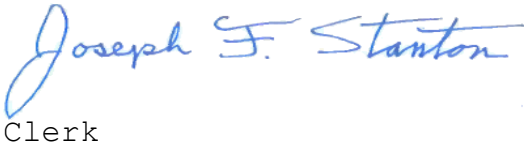
Here, there was no benefit to Salem Five from its closing attorney's action. To the contrary, the evidence established overwhelmingly that Salem Five would not have willingly closed a purchase money residential home loan without obtaining a one

hundred percent interest in the collateral. The judge found, based on uncontroverted testimony, that Salem Five did not learn of the defect in this transaction until the loan went into default. Although Salem Five received a closing package about a week after the closing, the only review of that file was a matter of routine conducted by a nonattorney, using a checklist to make sure all required documentation was provided; this routine audit did not involve legal analysis. Here, Salem Five did not purposefully or willfully shut its eyes to information available to it, nor did it receive a benefit from its agent's unauthorized act. Instead, Salem Five proceeded in a routine fashion having no reason to suspect that anything was amiss until the loan went into default. The judge's finding that ratification was not established is supported by the trial record and is not clearly erroneous. See Murray, 143 Mass. at 251 ("[R]atification . . . must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of

diligence").

Judgment affirmed.

By the Court (Maldonado, Singh & Wendlandt, JJ.[13]),



Clerk

Entered: June 24, 2019.

[13] The panelists are listed in order of seniority.