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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-528

JOHNNY L. ROCKETT APPELLANT V. NELL C. ROCKETT APPELLEE	**Opinion Delivered** March 2, 2011 APPEAL FROM THE HEMPSTEAD COUNTY CIRCUIT COURT [NO. CV-2008-162-2] HONORABLE DUNCAN M. CULPEPPER, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a decree ordering reformation of a deed. The parties were divorced by a decree entered September 3, 2003, that required appellee to transfer certain properties to appellant. A quitclaim deed was executed by appellee to implement the terms of the decree on November 1, 2003. The quitclaim deed was recorded in 2007. In 2008, appellee filed a complaint praying that a correction deed be issued. Appellee asserted that, although the divorce decree did not require appellee to transfer ownership of her interest in the "Studio Floor" property to appellant, the legal description of the Studio Floor property had been included in the quitclaim deed by mistake. Appellant responded by asserting that the Studio Floor property had in fact been intentionally included with the agreement of appellee following negotiations. After a hearing, the trial judge found for appellee and ordered

appellant to execute a correction deed. Appellant argues on appeal that the trial court clearly erred in so doing. We affirm.

When a description in a deed embraces lands that the seller did not intend to sell and the buyer did not intend to buy, its inclusion in the deed is the result of mutual mistake of the parties and may be corrected by reformation in a court of equity. *Glover v. Bullard*, 170 Ark. 58, 278 S.W. 645 (1926); *Lambert v. Quinn*, 32 Ark. App. 184, 798 S.W.2d 448 (1990). Reformation is an equitable remedy that is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence that agreement. *Lambert v. Quinn*, *supra*. A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Statler v. Painter*, 84 Ark. App. 114, 133 S.W.3d 425 (2003). Whether a mutual mistake warranting reformation occurred is a question of fact, and, although a mutual mistake must be shown by clear and decisive evidence, the evidence need not be undisputed. *Lambert v. Quinn*, *supra*. On appeal, we defer to the superior position of the trial judge to evaluate the evidence, and the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings but whether we can say that the trial judge's findings are clearly erroneous. *Statler v. Painter*, *supra*.

We cannot say that the trial court erred in the present case. The parties arrived at a property-settlement agreement that was set out in their divorce decree. Section G of the

decree required appellee to convey to appellant her interest in their real-estate rental properties. Section J, however, expressly stated that the Studio Floor property would be owned by the parties as tenants in common until it could be sold. Appellee testified that she did not intend to convey the Studio Floor property in the quitclaim deed and that she was assured by her attorney that this property was not included therein. Appellant testified that the Studio Floor property was included in the deed pursuant to an oral agreement with appellee and argues that his occupation of the property and payment of taxes since receiving the quitclaim deed demonstrates that such an agreement was made. We note, however, that these actions were equally consistent with appellant having exercised exclusive occupancy of that property while a buyer was sought, especially given that the mortgage on the property was in large part secured by appellee's assets. Ultimately the question is one of credibility and, giving due deference to the superior opportunity of the trial judge to view the demeanor of the witnesses as they testified, we cannot on this record say that the trial court clearly erred.

Affirmed.

HART and MARTIN, JJ., agree.