SUNOCO PARTNERS LLC, Plaintiff	:	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA
VS.	:	NO. 12-03342
RONALD A. RUSSO, Defendant	:	CIVIL ACTION

Kimberly L. Russell, Esquire, and Eric N. Macey, Esquire, Attorneys for Plaintiff
Peter J. Mooney, Esquire, and Edward T. Fisher, Esquire, Attorneys for Defendant

DECISION

AND NOW, this 14th day of November, 2013, following trial of the above captioned matter by the undersigned, sitting without a jury, we hereby find in favor of the defendant, Ronald A. Russo, and against the plaintiff, Sunoco Partners, LLC, in no amount on plaintiff's claim.[1] We hereby find in favor of the plaintiff, Sunoco Partners, LLC, and against the defendant, Ronald A. Russo, in no amount on defendant's counterclaim.[2]

BY THE COURT:

J.

[1] Plaintiff seeks reformation of a contract with defendant. "Under Pennsylvania law, however, courts may reform written contracts only when its terms do not reflect the intent of the parties to the contract, including in cases of fraud, accident or mistake." *McNaughton Properties, LP v. Barr*, 2009 PA Super 173, 981 A.2d 222, 229 (2009). As stated in *Zurich American Insurance Company v. O'Hanlon*, 2009 PA Super 42, 968 A.2d 765 (2009) quoting from *Holmes v. Lankenau Hospital*, 426 Pa.Super. 452, 627 A.2d 763 (1993):

> **Mutual mistake** will afford a basis for reforming a contract. Mutual mistake exists, however, **only where both parties** to a contract [are] mistaken as to existing facts at the time of execution. Moreover, to obtain reformation of a contract because of mutual mistake, the moving party is required to show the existence of the mutual mistake by evidence that is clear, precise and convincing.

Holmes, supra, at 767–68 as quoted in *Zurich, supra*, at 770 (emphasis added). Here, as in *Zurich*, plaintiff claims that there was a so-called scrivener's error. Here, plaintiff claims that the contract contained a provision that **neither party** intended to be included. In *Zurich*, it was contended that a contract omitted a provision that both parties had agreed would be included. Whether the alleged scrivener's error is the omission of a provision that had been agreed to be included or the inclusion of a provision that neither party intended to be a part of the contract, the legal analysis is the same. In either event, reformation is possible only where the mistake is **mutual.** In this case, the contract was not the result of negotiation. It was drafted by plaintiff and plaintiff alone. It was presented to defendant on a "take it or leave it" basis and defendant took it as it was presented. There was no error or mistake on the part of the defendant. Therefore, there was no **mutual** mistake which is a prerequisite for reformation.

[2] Defendant contends that pursuant to a contract with plaintiff, plaintiff was obligated to, *inter alia*, pay to defendant 10,536 common units. Plaintiff contends that defendant was entitled to the benefits of the contract only if defendant were employed by plaintiff as of December 31, 2011. Defendant acknowledges that he was not employed by plaintiff as of the relevant date but contends that he is nevertheless entitled to the benefits of the contract because he retired from the employ of plaintiff and that such retirement is an exception to the requirement of employment. Defendant has the burden of proof with regard to his claims. For the reasons set forth in footnote 1, *supra*, we must construe the contract as written. Our paramount consideration is to attempt to ascertain the intention of the parties. If the contract is clear and unambiguous, the language of the contract is the best expression of that intention. *Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc.*, 2013 PA Super 225, ___ A.3d ___ (2013). If the contract is ambiguous, however, then we must consider extrinsic evidence. Ambiguity may be created by the language of the instrument or by extrinsic or collateral circumstances. *Ibid.* Where, as here, the contract was drafted by only one of the parties, the ambiguity may be construed against the drafter but we may also consider other extrinsic evidence to assist in contract interpretation. In our opinion, the language of the third "whereas" clause and the introductory portion of paragraph 1.4 (which are consistent with each other) conflict with the language of paragraph 1.6(a) and render the contract sufficiently ambiguous so that we may consider extrinsic evidence as to the intended meaning of the contract. There is no question whatsoever that plaintiff intended the award of restricted units to be conditioned upon defendant's continued employment with plaintiff through December 31, 2011. Likewise, defendant testified that as of the date he signed the contract, he had no intent as to the meaning of the contract with respect to any provision governing retirement. We find that defendant did understand that plaintiff's motivation in entering into this contract was to provide incentive to defendant to remain employed with the plaintiff for the approximately 3 years from the date of the execution of the contract until the end of 2011. Defendant testified that he did not read the contract before signing it so he could not have been aware of paragraph 1.6 but he did "glance"

at the number of units involved. A few inches above the part of the contract defendant testified he did look at is the statement that the "payout of such Restricted Units **being conditioned upon the Participant's continued employment with the Company through the end of a three-year restricted period**." (emphasis added) Significantly, the other restricted unit agreement entered into by these parties on the same day did not contain any such language but did contain language regarding performance measures which is not contained in the contract here under consideration. We cannot enforce the contract exactly as written. For defendant to prevail, we would be required to add language that paragraph 1.6 takes precedence over paragraph 1.4 and, at least to some extent, perhaps paragraph 2.10 as well. Clearly, as of the time this contract was executed by the parties, neither of them had an affirmative intent that the contract had that meaning. On the other hand, it is clear that plaintiff intended paragraph 1.4 to be effective and that plaintiff included paragraph 1.6(a)(2) as a result of its own drafting error, although that error was not contributed to by defendant. In fact, defendant did not have any actual knowledge that paragraph 1.6 was included in the contract and would have executed it with or without that paragraph. At a minimum, defendant had no intent at the time the contract was executed as to what effect, if any, his retirement before December 31, 2011, would have on his right to receive restricted units but did know that plaintiff's intent in entering into this contract was to encourage defendant to continue in plaintiff's employ for at least the next 3 years. Under all of these circumstances, we believe that the closest we can come to giving effect to the intention of the parties at the time of the execution of their agreement is to construe the restricted units as being payable only if defendant were in the continuous employment of plaintiff from January 1, 2009, through December 31, 2011. As defendant did not meet that condition, he cannot prevail on his counterclaim.