Trenwick America Reinsurance Corp.
v.
W.R. Berkley Corp. et al.

UWYX01CV094019148S
Superior Court of Connecticut.
April 1, 2011

Cremins, William T., J.

MEMORANDUM OF DECISION

I

BACKSTORY

Trenwick America Reinsurance Corporation (Trenwick) is a reinsurance company with a principal place of business in Fairfield, Connecticut. "Trenwick brings this action individually and as successor to the Chartwell Reinsurance Company." (Amended revised complaint, July 6, 2010, count 1, ¶ 1.) The defendant W.R. Berkley Corporation (W.R.Berkley) "is an insurance holding company with a principal place of business in Greenwich, Connecticut." (Amended revised complaint, July 6, 2010, count 1, ¶ 2.) Signet Star Reinsurance Company (Signet Star), a subsidiary of W.R. Berkley, was a reinsurance company. Signet Star changed its name to Berkley Insurance Company (Berkley) on or about December 31, 2000. Berkley, a defendant, "is an affiliated or subsidiary company of W.R. Berkley with a principal place of business in Greenwich, Connecticut." (Amended revised complaint, July 6, 2010, count 1, ¶ 3.) "W.R. Berkley is the owner of affiliated or subsidiary companies, including those listed on Schedule A to a Commutation and Release Agreement ..." (Commutation agreement.) (Amended revised complaint, July 6, 2010, count 1, ¶ 4.)

"At various times before September 3, 2004, Trenwick entered into reinsurance agreements with W.R. Berkley affiliated and subsidiary insurance companies. These reinsurance agreements obligated Trenwick to reinsure certain liabilities of W.R. Berkley insurance companies." (Amended revised complaint, July 6, 2010, count 1, ¶ 5.) "In exchange for premiums paid by W.R. Berkley insurance companies, Trenwick agreed to pay a stated percentage of W.R. Berkley insurance companies' losses, claims, and other expenses." (Amended revised complaint, July 6, 2010, count 1, ¶ 6.)

Trenwick and Signet Star entered into an agreement on June 10, 1999, referred to as Special Casualty and Accident Reinsurance Facility (SCARF II). The effective date of SCARF II was January 1, 1999. Signet Star acted as a retrocedent, which meant that "it assumed the losses and premiums from other insurers before ceding them to Trenwick." (Plaintiff's posthearing brief, October 29, 2010, p. 2.) SCARF II obliged Trenwick "to accept a ten percent part of sixty percent of Signet Star's overall losses under the program in exchange for a corresponding quota share (ten percent) of the premiums that Signet Star collected." (Plaintiff's posthearing brief, October 29, 2010, p. 3.) Trenwick also "agreed to accept a 20 [percent] participation of the employer's liability [for workers' compensation claims] part of the program." (Plaintiff's posthearing brief, October 29, 2010, p. 3.) Duncanson & Holt, Inc. (D & H) was appointed by

Signet Star to be its managing general underwriter " 'for the purpose of procuring, underwriting, and servicing, on its behalf, reinsurance of other insurance' that would subsequently be retroceded under the SCARF II program to several retrocessionaires, including Trenwick." (Plaintiff's posthearing brief, October 29, 2010, p. 4.) Signet Star contracted with D.W. Van Dyke's Specialty Risks, Ltd. (DWVD) to serve as a communications and payment intermediary for the SCARF II program, which meant that all payments between Trenwick and Signet Star and/or D & H were transmitted through DWVD with payments pertaining to the employer's liability program being transmitted through American United Life Risk Management Services (American United). American United later succeeded D & H as manager. Citadel Risk Management, Inc. (Citadel) was subcontracted by American United to perform accounting duties in the management of SCARF II.

On or about September 3, 2004, Trenwick and W.R. Berkley entered into the commutation agreement.[FN1] The agreement was between Trenwick, "individually and as successor to Chartwell Reinsurance Company" (plaintiff's trial exhibit 1, p. 1); referred to as the "REINSURER" in the agreement and W.R. Berkley, "its subsidiaries and affiliates, including but not limited to the companies listed on SCHEDULE A" (plaintiff's trial exhibit 1, p. 1); collectively referred to as the "COMPANY" in this agreement. The REINSURER and the COMPANY are collectively referred to as the "Parties" in this agreement. The commutation agreement's stated purpose was to "fully and finally terminate, release, determine and fully and finally settle, commute and extinguish all [the parties'] respective past, present, and future obligations and liabilities, known and unknown, fixed and contingent, under, arising out of, and/or pursuant to the Reinsurance Agreements ..." (Plaintiff's trial exhibit 1, p. 1.)

> FN1. "Commutation is an agreement between the parties bringing to an end the liabilities of the reinsurer under the contract, usually a treaty, although possibly a long-term facultative contract. In its simplest form, a lump sum payment by the reinsurer is substituted for the unknown future liabilities on ceded risks and it is done for reasons on both sides having to do with the relative advantages of current and long-term money or the convenience of closing certain yearly accounts." G. Staring, Law of Reinsurance (1993) § 14:6.

The commutation agreement defined "reinsurance agreement" in the following paragraph: "WHEREAS, the Parties have entered various reinsurance agreements pursuant to which the REINSURER reinsured certain liabilities of the COMPANY and/or the COMPANY reinsured certain liabilities of the REINSURER (such agreements and all other agreements entered into in connection or relating to such agreements are referred to herein collectively as the 'Reinsurance Agreements' ..." (Plaintiff's trial exhibit 1, p. 1.) The commutation agreement required Trenwick to make a payment of $15,248,338 to W.R. Berkley "in full satisfaction of the REINSURER's past, present and future net liability under the Reinsurance Agreements ..." (Plaintiff's trial exhibit 1, p. 1–2.)

The commutation agreement further provided that in consideration of the payment from Trenwick, "the COMPANY shall automatically credit the REINSURER with full payment of all future balances under the Reinsurance Agreements as and when those balances become due, and the COMPANY hereby irrevocably and unconditionally releases and forever discharges the REINSURER including any predecessor or any affiliated insurance company, [its] parent, subsidiaries and affiliates, and their respective predecessors, successors, assigns, officers, directors, agents, employees, shareholders, representatives and attorneys from any and all present and future actions, causes of action, suits, debts, liens, contracts, rights, agreements, obligations, promises, liabilities, claims, demands, damages, controversies, losses, costs and expenses (including attorneys fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, which the COMPANY now has, owns or holds or claims to have, own, or hold, or at any time heretofore had, owned, or held or claimed to have had, owned, or held, or may hereafter have, own, or hold or claim to have, own, or hold, arising out of conduct or matters occurring prior to or subsequent to the EFFECTIVE DATE, against the REINSURER, arising from, based upon, or in any way related to the Reinsurance Agreements ... arising out of or relating to tort or contract or otherwise;

provided, however that the provisions of this Article 2(a) shall not discharge obligations of the REINSURER, which have been undertaken or imposed by the terms of this Agreement." (Plaintiff's trial exhibit 1, p. 2.) The commutation agreement further stated that it was "intended to and does finally resolve the rights, liabilities and obligations of the Parties arising directly or indirectly under or in connection with the Reinsurance Agreements and none of the Parties shall seek to reopen or set aside this Agreement on any grounds whatsoever, including (without prejudice to the generality of the foregoing) that the whole or any part of this Agreement or all or any of the Reinsurance Agreements ... are void or voidable for any mistake of fact or for any error howsoever arising (including any negligent act, error or omission of any other party) or on the basis that any of the Parties in the future becomes aware of any mistake of law (including any such mistake arising out of a subsequent change in the law which shall include, without limitation, a settled understanding of the law which is subsequently departed from by judicial decision), in any way whatsoever connected with or related directly or indirectly to this Agreement or any or all of the Reinsurance Agreements ..." (Plaintiff's trial exhibit 1, p. 3.)

The commutation agreement also stated: "This Agreement sets forth the entire Agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements or understandings between them pertaining to the subject matter hereof." (Plaintiff's trial exhibit 1, p. 6.) In addition the commutation agreement stated: "This Agreement may not be amended, altered, supplemented or modified, except by written agreement signed by the Parties." (Plaintiff's trial exhibit 1, p. 6.) Also the commutation agreement stated that Trenwick and the COMPANY "represents to the other as follows: (a) it has had full opportunity to consult with its respective attorneys in connection with the negotiation and drafting of this Agreement; (b) "it has carefully read and understands the scope and effect of each provision contained in this Agreement; (c) it has conducted all necessary due diligence, investigation and analysis of the transactions contemplated by this Agreement; and (d) it is not relying upon any representations made by any other party, its attorneys or other representatives." (Plaintiff's trial exhibit 1, p. 4.)

The Connecticut department of insurance approved the commutation agreement. Following the execution of the commutation agreement, Trenwick received approximately $56,000 in premium payments pertaining to SCARF II and also was billed and made at least ten payments to the program's third-party administrator for its SCARF II liabilities. Berkley, acting through DWVD, continued to bill Trenwick pursuant to SCARF II for amounts purportedly due to Berkley. It is the plaintiff's position that it paid DWVD a net payment of $436,132.76 under the "All Business Lines" program and a net payment of $14,873.36 to American United under the "Employer's Liability" program for a net total amount of $451,006.72.[FN2] The defendants dispute that amount.

> FN2. A net payment of $14,873.36 from the "Employer's Liability" program and a net payment of $436,132.72 from the "All Business Lines" program add up to $451,006.72, not $451,005.72.

From September 3, 2004, until approximately June 2008, Trenwick continued to make payments to DWVD. From 2006 to 2008, Trenwick began falling behind on its SCARF II payments and the SCARF II administrator starting pressing Trenwick for these past due payments. At the time, Trenwick assured the SCARF II administrator that it would be making some of these back payments and advised the administrator that it wanted to enter into discussions regarding commuting its obligations under SCARF II.

Stephen Eisenmann, a former executive vice president of Trenwick, became an executive vice president at Trenwick in January 2008. In that capacity, he had the opportunity to review the commutation agreement. Between January 2008 through June 2008, Eisenmann reviewed the commutation agreement and concluded that it commuted SCARF II and Trenwick had no obligation to make payments to Berkley after September 3, 2004. Eisenmann concluded that based on the commutation agreement's language, the agreement was global, thereby commuting all reinsurance agreements between Trenwick and Berkley. Robert W. Gosselink, a senior vice president of insurance risk management at W.R. Berkley who participated in the negotiations leading up to the execution of the commutation agreement, testified that if

the commutation agreement indeed commuted Trenwick's obligations under SCARF II, it was an inadvertent mistake. Richard Robert Thomas III, who at the time of the negotiation of the commutation agreement was a vice president at Trenwick and was involved in negotiating the commutation agreement, also said if the commutation agreement indeed commuted SCARF II, it was an inadvertent mistake on the part of Trenwick.

Eisenmann decided to stop making further payments under SCARF II and sought a return of the $451,006.72 he believed Trenwick had paid pursuant to SCARF II.

Berkley disagreed with Eisenmann's conclusion that the commutation agreement commuted SCARF II and disagreed that Berkley should return the money Trenwick paid under SCARF II following the execution of the commutation agreement.

At issue in this action is whether the commutation agreement discharged Trenwick's obligations under SCARF II (Count One) and whether Trenwick is entitled to a return of the money it paid under SCARF II (Count Two) following the execution of the commutation agreement.

II

JOURNEY OF THE PLEADINGS

Trenwick filed a complaint in this action on December 10, 2008. The operative complaint, the two-count amended revised complaint, was filed on July 6, 2010. Count one is seeking a declaratory judgment and count two sounds in unjust enrichment. On July 12, 2010, the defendants filed an answer as well as seven special defenses, which are not captioned. The first special defense as to count two alleges that the plaintiff *voluntarily* made payments to Citadel on behalf of American United, pursuant to the SCARF agreements, and therefore, the defendants were not unjustly enriched by these payments. The second special defense as to counts one and two alleges laches. The third special defense as to counts one and two alleges estoppel. The fourth special defense as to counts one and two alleges that the "[p]laintiff has released, settled, entered into an accord and satisfaction, and/or otherwise compromised its claims herein by executing the [c]ommutation [a]greement and SCARF [a]greements, by conducting itself in accordance with those agreements for years, and by more recently instituting, and ultimately abandoning, separate negotiations to commute the SCARF [a]greements. Accordingly, said claims are barred by operation of law." The fifth special defense as to counts one and two alleges that the "[p]laintiff's claims are barred to the extent [the] plaintiff seeks to reform the [c]ommutation [a]greement to include the SCARF [a]greements in that the claimed need for reformation arises from [the] plaintiff's purported unilateral mistake alone, attributable to [the] plaintiff's representatives' failure to include the SCARF [a]greements within the [c]ommutation [a]greement when the [c]ommutation [a]greement was drafted, negotiated and executed, and said mistake is not attributable to either defendants' fraud or inequitable conduct." The sixth special defense as to counts one and two alleges that "[s]hould this [c]ourt determine that the [c]ommutation [a]greement includes within its scope the SCARF [a]greements, [the][p]laintiff's claims are barred by the parties' mutual mistake, requiring this [c]ourt to reform the [c]ommutation [a]greement to exclude the SCARF [a]greements, as that was the parties' actual intent at the time of executing the [c]ommutation [a]greement ..." The seventh special defense as to counts one and two alleges novation.

This court will only address the special defenses raised in the defendants' posttrial memoranda as the Supreme Court has stated: "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief ... Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly ... Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Taylor v. Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008).

A trial was held before the court between July 13, 2010, and July 16, 2010. The parties submitted posttrial briefs on October 29, 2010, and reply briefs on November 22, 2010. Closing arguments were held on December 10, 2010.

III

DISCUSSION

A

Count One

Declaratory Judgment

"The Declaratory Judgment Act, codified at General Statutes § 52–29, was adopted in 1921 to allow our trial courts to provide declaratory relief." *Batte–Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 287, 914 A.2d 996 (2007). "Declaratory relief provides a valuable tool by which litigants may resolve uncertainty of legal obligations ... The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances ... A declaratory judgment action is not, however, a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies ..." *Constantino v. Skolnick*, 294 Conn. 719, 745, 988 A.2d 257 (2010).

"An action for declaratory judgment is a special proceeding under ... § 52–29, implemented by Practice Book §§ 17–54 and 17–55." *ACMAT Corp. v. Greater New York Mutual Ins. Co.*, 88 Conn.App. 471, 475, 869 A.2d 1253, cert. denied, 274 Conn. 903, 876 A.2d 11 (2005). General Statutes § 52–29 provides: "(a) The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment.

"(b) The judges of the Superior Court may make such orders and rules as they may deem necessary or advisable to carry into effect the provisions of this section." "[Section] 52–29 authorizes the Superior Court to adjudicate declaratory judgment actions and delegates to the judiciary the task of making rules to govern such actions." (Internal quotation marks omitted.) *Electric Cable Compounds, Inc. v. Seymour*, 95 Conn.App. 523, 528, 897 A.2d 146 (2006).

Practice Book § 17–54 provides: "The judicial authority will, in cases not herein excepted, render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future. Practice Book § 17–55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met:

"(1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations;

"(2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and

"(3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

Practice Book § 17–56 provides in relevant part: "(a) Procedure in actions seeking a declaratory judgment shall be as follows:

"(1) The form and practice prescribed for civil actions shall be followed.

"(2) The prayer for relief shall state with precision the declaratory judgment desired and no claim for consequential relief need be made.

"(3) Actions claiming coercive relief may also be accompanied by a claim for a declaratory judgment, either as an alternative remedy or as an independent remedy.

"(4) Subject to the provisions of Sections 10–21 through 10–24, causes of action for other relief may be joined in complaints seeking declaratory judgments."

"[T]he trial court may, in determining the rights of the parties, properly consider equitable principles in rendering its judgment." *Middlebury v. Steinmann*, 189 Conn. 710, 715, 458 A.2d 393 (1983).

Contract Interpretation

The plaintiff argues that its claim for declaratory relief should be granted. The plaintiff maintains that SCARF II was one of the reinsurance agreements commuted under the commutation agreement. According to the plaintiff when a contract's language is clear and unambiguous, the contract must be interpreted according to its terms. The plaintiff maintains that "the [d]efendants have no right to add a new term to the [c]ommutation agreement excluding the SCARF II [a]greement, even if it appears that this exclusion in all probability ... would have been inserted if the attention of the parties had been called to it. The [a]greement cannot be rewritten after the fact. The [c]ommutation [a]greement must be interpreted and enforced according to the parties' intent as expressed in the [a]greement, not anywhere else." (Internal quotation marks omitted.) (Plaintiff's posttrial brief, October 29, 2010, p. 12.) The plaintiff contends that the term "Reinsurance Agreement" is clear and unambiguous and includes SCARF II.

The defendants argue that the plaintiff has not proven it is entitled to declaratory judgment. The defendants contend that the commutation agreement is ambiguous as to its scope, especially what Trenwick and W.R. Berkley "intended would be covered by the term 'reinsurance agreements between.' " (Defendants' posttrial brief, October 29, 2010, p. 20.) According to the defendants, the evidence establishes that based on the commutation agreement's language that Trenwick and W.R. Berkley did not intend to commute SCARF II. The defendants maintain that the evidence shows that SCARF II is a pool or facility, which differs from a reinsurance agreement "as it involves various other agreements, contracts and parties." (Defendant's posttrial brief, October 29, 2010, p. 20.) The defendants assert that the commutation agreement referred to reinsurance agreements, and not to pools or facilities such as SCARF II.

According to the defendants, the reinsurance industry uses the terms "facility" and "pool" interchangeably when describing pools. The defendants contend that SCARF II is "a pool or facility comprised of numerous contracts, including reinsurance agreements among the several participating reinsurers (including Trenwick and Signet Star), which involved the participation not only of several

insurers other than Trenwick and Signet Star, but also third-party underwriters, managers and administrators." (Defendant's posttrial brief, October 29, 2010, p. 8.) The defendants argue that pools or facilities involve a producing broker who is often known as a managing underwriter or managing general agent "who can underwrite and bind the retrocedents and retrocessionaires or parties to that pool or facility." (Defendants' posttrial brief, October 29, 2010, p. 9.) The defendants contend that a pool or facility differs from a reinsurance agreement because the pool or facility "involves various other agreements and contracts aside from the subscribing reinsurance agreements that are part of a pooling agreement or facility." (Defendants' posttrial brief, October 29, 2010, p. 9.)

The defendants argue that SCARF II is a pool or facility which differs from a reinsurance agreement. The defendants maintain that in contrast "[a] reinsurance agreement is one where a party, known as a reinsurer, in exchange for receipt of a portion of the premiums paid by the policy-holder to the original insurer, known as a cedant, assumes a proportional share of the risks of loss covered by the underlying insurance policy. A reinsurance agreement can also be between a reinsurer as a cedant and another insurance company, as a reinsurer, at a level further removed. In the latter circumstances, the reinsurer receiving a portion of the premiums and assuming a part of the risks is named the retrocessionaire, and the reinsurer ceding a portion of the premiums and reducing its risks of loss is known as a retrocedent." (Defendant's posttrial brief, October 29, 2010, p. 8–9.) The defendants argue that reinsurance agreements that are not pools do not involve third-party underwriters as the cedants or reinsurers themselves performs the functions of underwriting, rating and marketing.

The plaintiff argues that SCARF II, is in fact, a reinsurance agreement notwithstanding the defendants' assertions to the contrary. The defendants have previously argued that SCARF II was excluded from the commutation agreement because it was a multiparty agreement and not a bilateral agreement, and the commutation agreement was confined to bilateral reinsurance agreements. In addition, the plaintiff contends that the defendants, in their answer to the operative complaint, admit that SCARF II was a reinsurance agreement. According to the plaintiff, "[t]he fact that Signet Star had underwriters, managers, or administrators does not transform the nature of the reinsurance contract; it still is a reinsurance contract, one of the various reinsurance agreements commuted, regardless of whether an agent performed the underwriting or various other tasks." (Internal quotation marks omitted.) (Plaintiff's posttrial reply brief, November 22, 2010, p. 4.) The plaintiff argues that SCARF II is not a pooled agreement as Trenwick and Signet Star entered into a two-party interest and liabilities contract "which is part of a multiparty reinsurance program in which Signet Star executed similar interest and liabilities agreements with other reinsurers." (Plaintiff's posttrial reply brief, November 22, 2010, p. 4.)

The defendants argue that the word "Global" does not appear in any of the contractual documents. The defendants assert that the plaintiff's attempt to define SCARF II as just another reinsurance agreement is not supported by the record and "ignores the overwhelming and consistent evidence that both parties clearly understood and consistently treated the SCARF II FACILITY as outside the scope of the [c]ommutation [a]greement because it was in fact an entirely different type of program involving numerous other parties in various roles operating under multiple agreements, including several reinsurance agreements, to which all the parties were bound in the aggregate." (Defendants' posttrial reply brief, November 22, 2010, p. 5.)

"A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction ...

"[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing] ... Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ... Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms." (Citation omitted; internal quotation marks omitted.) *Connecticut National Bank v. Rehab Associates*, 300 Conn. 314, 318–19, 12 A.3d 995 (2011).

The standard of review for the issue of contract interpretation is well established. "In construing an unambiguous contract, the controlling factor is the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had." (Internal quotation marks omitted.) *Antonio v. Johnson*, 113 Conn.App. 72, 75, 966 A.2d 261 (2009). "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Honulik v. Greenwich*, 293 Conn. 698, 710–11, 980 A.2d 880 (2009).

"[A] court cannot import into the agreement a different provision nor can the construction of the agreement be changed to vary the express limitations of its terms ... We assume no right to add a new term to a contract, though it were clear that had the attention of the parties been called to it in all probability it would have been inserted." (Citation omitted; internal quotation marks omitted.) *Pesino v. Atlantic Bank of New York*, 244 Conn. 85, 93, 709 A.2d 540 (1998).

"If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous ... By contrast, language is unambiguous when it has a definite and precise meaning ... concerning which there is no reasonable basis for a difference of opinion." (Internal quotation marks omitted.) *Poole v. Waterbury*, 266 Conn. 68, 88, 831 A.2d 211 (2003). "When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract." *Id.*, 89. "[A] presumption that the language used is definitive arises when ... the contract at issue is between sophisticated parties and is commercial in nature." (Internal quotation marks omitted.) *Connecticut National Bank v. Rehab Associates, supra,* 300 Conn. 319.

"In ascertaining the contractual rights and obligations of the parties, we seek to effectuate their intent, which is derived from the language employed in the contract, taking into consideration the circumstances of the parties and the transaction ... We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract ... Where the language is unambiguous, we must give the contract effect according to its terms ..." (Citations omitted.) *Cantonbury Heights Condominium Assn., Inc. v. Local Land Development, LLC*, 273 Conn. 724, 734–35, 873 A.2d 898 (2005).

Furthermore, "[a] contract is unambiguous when its language is clear and conveys a definite and precise intent ... In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself ... The contract must be viewed in its entirety, with each provision read in light of the other provisions ... and every provision must be given effect if it is possible to do so ..." (Internal quotation marks omitted.) *Id.*, 735. With these principles in mind, we turn to the commutation agreement.

The first paragraph of the commutation agreement states: "This Commutation and Release Agreement (the 'Agreement') is made by and between Trenwick Reinsurance Corporation, individually and as successor to Chartwell Reinsurance Company (collectively, the 'REINSURER'), an insurance company domiciled in the State of Connecticut and W.R. Berkley Corporation, and its subsidiaries and affiliates, including but not limited to the companies listed on Schedule A (collectively, 'COMPANY'), an insurance holding company domiciled in the State of Delaware,[FN3] effective as of the EFFECTIVE DATE (as hereinafter defined). The REINSURER and the COMPANY are hereinafter referred to collectively as the 'Parties.' " (Plaintiff's trial exhibit 1, p. 1.) Berkley is one of the companies listed on Schedule A.

FN3. The plaintiff alleges in the operative complaint that W.R. Berkley has its principal place of business in Greenwich, Connecticut and the defendants admit that allegation in their answer.

The commutation agreement further states: “WHEREAS, the Parties have entered various reinsurance agreements pursuant to which the REINSURER reinsured certain liabilities of the COMPANY and/or the COMPANY reinsured certain liabilities of the REINSURER (such agreements and all other agreements entered into in connection or relating to such agreements are referred to herein collectively as the ‘Reinsurance Agreements'); and ...

* * * *

“WHEREAS, the Parties now wish to fully and finally terminate, release, determine and fully and finally settle, commute and extinguish all their respective past, present, and future obligations and liabilities, known and unknown, fixed and contingent, under, arising out of, and/or pursuant to the Reinsurance Agreements; and

“WHEREAS, the Parties recognize and understand that a final fixed advanced payment now by the REINSURER to fully satisfy its past, present and future net obligations to the COMPANY under the Reinsurance Agreements as and when they become due will eliminate the uncertainty of contingent liabilities for presently unresolved or unknown losses, and that the Parties will benefit by the COMPANY's acceptance of a full, final fixed advanced payment from the REINSURER now and hereinafter crediting the REINSURER with full payment of all future loses and expenses which would otherwise have been payable by the REINSURER as and when the REINSURER's obligation becomes due; and

“WHEREAS, the REINSURER has offered to pay and the COMPANY has agreed to accept in full satisfaction of the REINSURER's past, present and future net liability under the Reinsurance Agreements, the sum of U.S. $15,248,338 (Fifteen million two hundred forty eight thousand, three hundred thirty eight Dollars) (the ‘COMMUTATION AMOUNT’);

“NOW, THEREFORE, in consideration of the covenants, conditions, promises and releases contained herein, and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to commute all rights and obligations under the Reinsurance Agreements as follows ...” (Plaintiff's trial exhibit 1, p. 1–2.)

Given the language of the commutation agreement, the commercial nature of the agreement, and the fact that Trenwick and W.R. Berkley are sophisticated parties who had the benefit of counsel when negotiating and drafting the commutation agreement, the court finds that the commutation agreement is unambiguous. Reinsurance is defined as “[i]nsurance of all or part of one insurer's risk [Berkley] by a second insurer, [Trenwick] who accepts this risk in exchange for a percentage [10 percent of 60 percent] of the original premium.” (Relative position of parties added by the court.) Black's Law Dictionary (7th Ed.1999). The court further finds that SCARF II is a reinsurance agreement.

Next this court will examine what role parol evidence has in interpreting contracts. “[T]he parol evidence rule ... is not a rule of evidence, but a substantive rule of contract law. The rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme ...”

“The [parol] evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity

appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud ... These recognized exceptions are, of course, only examples of situations where the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated; or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud." (Internal quotation marks omitted.) *Palozie v. Palozie*, 283 Conn. 538, 548 n.8, 927 A.2d 903 (2007). "Generally, however, we continue to adhere to the general principle that the unambiguous terms of a written contract containing a merger clause may not be varied or contradicted by extrinsic evidence. *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 503, 746 A.2d 1277 (2000)." (Internal quotation marks omitted.) *Alstom Power, Inc. v. Balcke–Durr, Inc.*, 269 Conn. 599, 610, A.2d 804 (2004).

"In order for the bar against the introduction of extrinsic evidence to apply, the writing at issue must be integrated, that is, it must have been intended by the parties to contain the whole agreement ... and to be a final expression of one or more terms of [the] agreement ... [S]ee also 3 A. Corbin, *supra,* § 539, p. 77 ([w]hen an agreement has been reduced to writing, one that is assented to as the full and operative statement of terms, the writing has been described as an integration); 11 S. Williston, *supra,* § 33:14, p. 612 (integrated agreement exists when [the parties] mutually consent to a certain writing or writings as the final statement of the agreement or contract between them)." (Citations omitted; internal quotation marks omitted.) *Tallmadge Bros, Inc. v. Iroquois Gas Transmission System, L.P., supra,* 252 Conn. 503.

In the present case, the commutation agreement contains the following merger clause: "This Agreement sets forth the entire Agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements or understanding between them pertaining to the subject matter hereof." (Plaintiff's trial exhibit 1, p. 6.)

The court in *Tallmadge Bros., Inc.* stated with regard to merger clauses: "Although the question of what weight should be given to a merger clause has prompted a number of differing views, much of this disagreement has occurred in the context of unequal bargaining power between the parties, fraud, duress, or contracts in contravention of public policy. See 11 S. Williston, *supra,* § 33:22, p. 674. The general rule of contract law remains that a [merger] clause ... is likely to conclude the issue [of] whether the agreement is completely integrated. 2 Restatement (Second), Contracts § 216, comment (e) (1981)." *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P., supra,* 252 Conn. 504.

The court in *Tallmadge Bros., Inc.* stated that "[n]one of the concerns that might call the merger clauses into question is present in this case. As discussed previously, the parties here possessed relatively equal bargaining power, and they executed the settlement agreements only after a lengthy drafting process during which they had received the advice of counsel. We conclude, therefore, that the parties' insertion of the merger clauses into the settlement agreements is conclusive evidence of their intent to create fully integrated contracts, and that the trial court's subsequent consideration of extrinsic evidence was improper." *Id.,* 504–05.

As in *Tallmadge,* the court finds that in the present case, both Trenwick and W.R. Berkley had relative equal bargaining power and they executed the commutation agreement after lengthy negotiations in which both Trenwick and W.R. Berkley received the advice of counsel. Therefore, analogous to *Tallmadge,* this court finds that the insertion of the merger clause in the commutation agreement is "conclusive evidence" of Trenwick and W.R. Berkley's intent to create a contract that was fully integrated and therefore, this court cannot consider extrinsic evidence as to Trenwick and W.R. Berkley's intent regarding excluding SCARF II from the commutation agreement. Therefore, examining the text of the commutation agreement itself, the court finds that SCARF II was a reinsurance agreement between Berkley and Trenwick and the commutation agreement commuted SCARF II.[FN4] Next, the court will turn to the special defenses to determine if any of the defenses pertaining to count one defeat the plaintiff's claim.

FN4. Although the *Tallmadge Bros., Inc.* court stated that extrinsic evidence would be admissible to show mistake; *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P., supra,* 252 Conn. 503 n.14; this court does not find mistake in the present case, which is supported by the fact that the commutation agreement is a commercial contract and Trenwick and W.R. Berkley are sophisticated parties who had the benefit of counsel when engaged in negotiating and drafting the commutation agreement. Furthermore, as per *Pesino,* this court cannot import an exclusion of SCARF II from the commutation agreement even if Trenwick and/or Berkley would have done so had attention been brought to the matter during the drafting of the commutation agreement.

B

Special Defenses as to Counts One

Laches—Count One

With regard to the defendants' special defense of laches, which the defendants allege as to count one of the operative complaint, the defendants argue that in the current action, the plaintiff "submitted the [c]ommutation [a]greement to the Connecticut [d]epartment of [i]nsurance, which approved it on September 30, 2004." (Defendants' posttrial brief, October 29, 2010, p. 29.) According to the defendants, following the department of insurance's approval of the commutation agreement, the plaintiff received approximately $56,000 in premium payments through its participation in SCARF II. The defendants assert that from September of 2004 until sometime in 2008, the plaintiff continued to make payments to SCARF II's third-party administrator for its liabilities under that agreement.

The defendants further contend that between the summer of 2006 through the summer of 2008, the plaintiff made multiple attempts to commute its obligations under SCARF II but never indicated to the defendants that it considered its obligations under SCARF II to be commuted under the commutation agreement until October of 2008 and waited until December of 2008 to file this action. The defendants maintain that given that the plaintiff waited for four years to inform the defendants that its position was that the commutation agreement commuted SCARF II, the plaintiff's action is barred by laches. The defendants also contend that they were prejudiced because the plaintiff ceased making payments that it owed under SCARF II and collected approximately $56,000 in premium payments through its participation in the program.

The plaintiff argues that its claims are not barred by laches because any delay in pursuing their claims was excusable and laches only applies in cases where the delay was inexcusable and the defendant was prejudiced. According to the plaintiff, the commutation agreement was executed in September of 2004 and its employees did not recognize the error until 2008. The plaintiff contends that once Eisenmann discovered the error, the plaintiff took prompt action to correct it. The plaintiff asserts that the defendants have not offered evidence to support that they have suffered prejudice. The plaintiff maintains that the "[t]he termination of a benefit to which one is not entitled—and which one wrongfully retains and refuses to return in violation of equity and the law—is not prejudice." (Plaintiff's reply brief, November 22, 2010, p. 13.)

"Laches consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *Mendillo v. Board of Education,* 246 Conn. 456, 487 n.21, 717 A.2d 1177 (1998). "The mere lapse of time does not constitute laches ... unless it results in prejudice to the [opposing party] ... as where, for example, the opposing party] is led to change his position with respect to the matter in question." (Internal quotation marks omitted.)

Caminis v. Troy, 112 Conn.App. 546, 552, 963 A.2d 701 (2009), aff'd on other grounds, 300 Conn. 297, 12 A.3d 984 (2011). The Appellate Court in *Caminis v. Troy, supra,* 112 Conn.App. 557–60, found laches was available as a special defense for a declaratory action.

"Equity ordinarily will refuse a remedy when the statute applying to similar actions at law has run ..." (Citation omitted.) *Lesser v. Lesser*, 134 Conn. 418, 423, 58 A.2d 512 (1948). "[I]n an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute ... Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obliged to adhere to those time limitations." *Rossman v. Morasco*, 115 Conn.App. 234, 256, 974 A.2d 1, cert. denied, 293 Conn. 923, 980 A.2d 912 (2009).

In the present case, the court looks to the statute of limitations for the analogous action of breach of contract.[FN5] General Statutes § 52–576 provides in relevant part: "(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section." Given that the statute of limitations for a breach of contract action would not have run by the time the plaintiff brought suit in 2008, the court finds that the plaintiff did not engage in unreasonable delay in filing suit; therefore, the special defense of laches is not a bar to count one of the plaintiff's action.

FN5. In *Kelley v. Five S Group, LLC,* Superior Court, judicial district of Hartford, Docket No. CV 08 5023936 (February 1, 2011, Scholl, J.), the Superior Court applied the statute of limitations for breach of contract when addressing a reformation of contract claim.

Estoppel—Count One

Next the court will address the defendants' special defense of estoppel, which the defendants allege as to count one of the operative complaint. "The standards governing the application of equitable estoppel are well established. There are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *O'Connor v. Waterbury*, 286 Conn. 732, 757, 945 A.2d 936 (2008). "Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct." *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 60, 873 A.2d 929 (2005). "The party claiming estoppel ... has the burden of proof." *O'Connor v. Waterbury, supra,* 758.

"It is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge." (Internal quotation marks omitted.) *Celentano v. Oaks Condominium Association*, 265 Conn. 579, 615, 830 A.2d 164 (2003).

" '[T]here must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury.' ... *Novella v. Hartford Accident & Indemnity Co.*, 163 Conn. 552, 564, 316 A.2d 394 (1972). 'In the absence of prejudice, estoppel does not exist.' ... *Morris v. Costa*, 174 Conn. 592, 599, 392 A.2d 468 (1978)." *Coss v. Steward*, 126 Conn.App. 30, 41–42, 10 A.3d 539 (2011).

The defendants argue that the evidence conclusively establishes that estoppel bars the plaintiff's action. According to the defendants, the plaintiff took a number of actions to induce the defendants to believe that the commutation agreement did not commute the plaintiff's obligations or liabilities under SCARF II. The defendants contend that from the close of the commutation agreement in 2004 until sometime in 2008, the

plaintiff was billed for and made payments to SCARF II's third-party administrator for the plaintiff's SCARF II liabilities. The defendants further maintain that in the plaintiff's annual reports filed with the department of insurance for 2004, 2005, 2006 and 2007, the plaintiff reported the payments that it made pursuant to SCARF II "reflecting the parties' undisputed contemporaneous state of mind that [the plaintiff's] obligations under SCARF II FACILITY had not been commuted by the [c]ommutation [a]greement." (Defendant's posttrial brief, October 29, 2010, p. 31.) The defendants also assert that that when the SCARF II administrator continued to seek payments from the plaintiff for past due amounts under SCARF II, the plaintiff assured the "administrator that its payments would be forthcoming." (Defendant's posttrial brief, October 29, 2010, p. 31.)

The defendants argue that they relied on these actions and engaged in conduct of their own that they would not have done had the commutation agreement commuted SCARF II. According to the defendants, after the execution of the commutation agreement, the plaintiff received approximately $56,000 in premiums from its participation in SCARF II.

The plaintiff counters that neither of the two elements of estoppel are present in this action. According to the plaintiff, the defendants failed to prove that the plaintiff "calculated or intended to induce them into believing that the SCARF [a]greements were not included in the scope of the [c]ommutation [a]greement." (Plaintiff's reply brief, November 22, 2010, p. 13.) The plaintiff asserts that both the plaintiff and defendants had the independent belief that "SCARF II was not commuted." (Plaintiff's reply brief, November 22, 2010, p. 14.) The plaintiff contends that "[t]he [d]efendants' belief was never the result of any calculated efforts on the part of [the plaintiff]." (Plaintiff's reply brief, November 22, 2010, p. 14.)

The court finds that the defendants have not met their burden of proof with regard to their contention that the plaintiff's actions in paying SCARF II's third-party administrator for liabilities from 2004 to 2008 and reporting said payments to the department of insurance from 2004 to 2007 fulfill the criteria that would constitute an estoppel that would bar count one of the operative complaint.

Release, Accord and Satisfaction and/or Compromised Claims—Count One

The defendants argue, in support of their fourth special defense as to count one, that the plaintiff is precluded from pursuing its claims due to release, accord and satisfaction/and or comprised claims. The defendants contend that "Accord and satisfaction [bar] the assertion of the original claim and discharges a party's duty ... Moreover, pursuant to the doctrine of accord and satisfaction, a party that pays a sum is also barred from making claims as to the sum paid." (Defendants' posttrial brief, October 29, 2010, p. 33.) The defendants maintain that in this action, the plaintiff "has released, settled, entered into an accord and satisfaction, and/or otherwise compromised its claims herein by executing the [c]ommutation [a]greement and by conducting itself in accordance with those agreements for years, and by more recently instituting, and ultimately abandoning, separate negotiations to commute ... SCARF II ..." (Defendants' posttrial brief, October 29, 2010, p. 33.)

In response, the plaintiff argues that it made payments to the defendants under SCARF II by mistake and upon discovering that mistake, stopped making the payments and asked for the money to be returned. The plaintiff asserts that "[t]o characterize this mistake as an accord—which requires that the parties agree to accept a new performance in satisfaction of an existing duty—is not relevant to the facts of this matter, and plainly wrong." (Plaintiff's reply brief, November 22, 2010, p. 14.)

In *B & B Bail Bonds Agency of Connecticut, Inc. v. Bailey*, 256 Conn. 209, 210, 770 A.2d 960 (2001), a case cited by the defendants in support of their argument, the plaintiff executed a $150,000 surety bond to secure an individual's release. *Id.*, 210. Subsequently, the individual failed to appear in court, "[t]he order of forfeiture was stayed for six months pursuant to [General Statutes] § 54–65a(a);" *B & B Bail Bonds Agency of Connecticut, Inc. v. Bailey, supra,* 210–11; the plaintiff located the individual in Jamaica, and the

state's attorney did not pursue the individual's extradition. *B & B Bail Bonds Agency of Connecticut, Inc. v. Bailey, supra,* 210–11. Following the six-month stay, the state agreed that if the plaintiff did not return the individual to the state of Connecticut within one week, the plaintiff would pay "$75,000 to satisfy forfeiture of the bond." *Id.,* 211. The plaintiff did not return the individual and made the $75,000 payment and later "filed motions for release from bond and rebate from bond forfeiture"; *id.;* which the trial court denied. *Id.*

The plaintiff then brought a writ of error under Practice Book § 72–1, alleging that as the state failed to seek the individual's extradition, that was "good cause" under Practice Book § 38–23 to release the plaintiff from its obligation. *B & B Bail Bonds Agency of Connecticut, Inc. v. Bailey, supra,* 256 Conn. 211.

In *B & B Bail Bonds Agency of Connecticut, Inc.,* the court stated: "When there is a good faith dispute about the existence of a debt or about the amount that is owed, the common law authorizes the debtor and the creditor to negotiate a contract of accord to settle the outstanding claim ... *Herbert S. Newman & Partners, P.C. v. CFC Construction Ltd. Partnership,* 236 Conn. 750, 764, 674 A.2d 1313 (1996). An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty ... *Tolland Enterprises v. Scan–Code, Inc.,* 239 Conn. 326, 333, 684 A.2d 1150 (1996). Upon acceptance of the offer of accord, the creditor's receipt of the promised payment discharges the underlying debt and bars any further claim relating thereto, if the contract is supported by consideration ... *Blake v. Blake,* [211 Conn. 485, 491, 560 A.2d 396 (1989)]. Although the case law presents the more usual use of accord and satisfaction as a defense by the debtor against the creditor, it is evident that accord and satisfaction equally applies to both parties. Accord and satisfaction is a method of discharging a claim whereby the *parties* agree to *give and accept* something other than that which is due in settlement of the claim and to perform the agreement ... 1 Am.Jur.2d, Accord and Satisfaction § 1 (1994)." (Emphasis in original; internal quotation marks omitted.) *B & B Bail Bonds Agency of Connecticut, Inc. v. Bailey, supra,* 256 Conn. 212–13.

In *B & B Bail Bonds Agency of Connecticut, Inc.,* the state claimed that the plaintiff owed $150,000 while the plaintiff claimed that the state was obligated to extradite the individual. *Id.,* 213. The plaintiff negotiated for an extension of the stay beyond the time of the statutory extension but if the individual was not returned by then, the plaintiff "agreed to pay $75,000 to the state, in [the plaintiff's] own words, as a 'compromise' of the bond forfeiture. Such a compromise becomes an executed contract that bars any further claim by [the plaintiff] or the state.

"Under the doctrine of accord and satisfaction, the state is barred from collecting the sum of $150,000 after accepting the negotiated settlement. [The plaintiff] also is barred from further claims as to the $75,000 that it paid." *Id.,* 213–14. The court concluded that the trial court was correct in denying the plaintiff's motions. *Id.,* 214.

The facts in the present case are distinguishable from the facts of *B & B Bail Bonds Agency of Connecticut, Inc.* In the present case, the parties assert that the plaintiff and W.R. Berkley entered into a commutation agreement in 2004 that, according to the plaintiff, commuted SCARF II and according to the defendants, did not. The parties further maintain that under the impression that the plaintiff was obligated to make payments for SCARF II's liabilities, the plaintiff did so for a period of time after the execution of the commutation agreement. The defendants additionally contend that from 2006 to 2008, the plaintiff and W.R. Berkley attempted to reach a compromise with regard to the plaintiff's obligations under SCARF II but those negotiations failed. Under the present case, none of the parties brought evidence to show that any postcommutation agreement negotiations led to a contract of accord which would have discharged any claims the plaintiff may have had with regard to the commutation agreement commuting SCARF II. Therefore, the court finds that count one is not precluded by release, accord and satisfaction and/or compromised claims.

Reformation—Count One

In their sixth special defense, which is alleged as to count one, the defendants allege that mutual mistake bars the plaintiff's claims in count one and requires this court to reform the commutation agreement to exclude SCARF II to reflect the intent Trenwick and W.R. Berkley had at the time of the execution of the commutation agreement. As this court makes a finding of no mistake with regard to its finding to not consider parol evidence to contradict the commutation agreement's merger clause, it further finds that the defendants are not entitled to a reformation of the commutation agreement and that this special defense does not serve as a bar to count one of the operative complaint.[FN6] Next, this court will turn to count two of the operative complaint.

FN6. As the court finds that the defendants are not entitled to reformation due to the court's finding of no mistake, the court will not address the plaintiff's arguments regarding the existence of an anti-reformation clause in the commutation agreement and the defendants' argument that such a clause is a violation of public policy.

C

Count Two

Unjust Enrichment

"To prevail on a claim of unjust enrichment, the plaintiff must prove (1) that the [defendant was] benefited, (2) that the [defendant] unjustly did not pay the [plaintiff] for the benefits, and (3) that the failure of payment was to the [plaintiff's] detriment." (Internal quotation marks omitted.) *Hall v. Bergman*, 296 Conn. 169, 182 n.7, 994 A.2d 666 (2010).

The plaintiff is seeking reimbursement of the $451,005.72 [FN7] (plus interest and costs) that it argues it paid under SCARF II following the execution of the commutation agreement on September 3, 2004. According to the plaintiff, who quotes language from the commutation agreement, "[t]he [d]efendants should have released Trenwick from any liability under the SCARF II[a]greement the moment that they agreed to accept a lump sum payment of $15,248,338.00 from Trenwick 'in full satisfaction of [Trenwick's] past, present and future net liability under the Reinsurance Agreements.' " (Plaintiff's posttrial brief, October 29, 2010, p. 20.) According to the plaintiff, pursuant to the commutation agreement, it was under no obligation to make the payments it made to Citadel and/or DWVD, which were in turn remitted to Signet Star. The plaintiff argues that the defendants' refusal to reimburse the plaintiff has caused them to be unjustly enriched in the amount of $451,005.72. The plaintiff maintains that through its mistaken belief that it was still obligated to make payments under SCARF II, the defendants received the monetary benefit of that mistake, which they should not be permitted to retain.

FN7. See footnote 2.

The defendants argue, *inter alia,* that the plaintiff's unjust enrichment claim must fail because the claim is governed by an express written contract. The defendants contend that "[w]here an express contract between the parties governs the subject matter of a dispute, that contract precludes recognition of an *implied-in-law* contract that would form the basis for an unjust enrichment claim." (Emphasis in original.) (Defendants' posthearing brief, October 29, 2010, p. 24.) The plaintiff argues that unjust enrichment applies where there is a contract but there is no remedy available through a contract action.

"It is often said that an express contract between the parties precludes recognition of an implied-in-law contract governing the same subject matter ... *Meaney v. Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 517, 735 A.2d 813 (1999); see also *H.B. Toms Tree Surgery, Inc. v. Brant*, 187 Conn. 343, 347, 446 A.2d 1 (1982) ('parties who have entered into controlling express contracts are bound by such contracts to the exclusion of inconsistent implied contract obligations'); *Polverari v. Peatt*, 29 Conn.App. 191, 199, 614 A.2d 484 (same), cert. denied, 224 Conn. 913, 617 A.2d 166 (1992); 66 Am.Jur.2d 621, Restitution and Implied Contracts § 24 (2001). Thus, in *Meaney*, [the Supreme Court] concluded that an employee could not recover in unjust enrichment against his employer for its failure to pay him incentive compensation when there existed an express, enforceable employment contract that set the terms of the employee's salary but did not provide for such compensation, and the employee did not claim that he had performed services not contemplated by that contract. *Meaney v. Connecticut Hospital Assn., Inc., supra,* 517; see also *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 905–06 (2d Cir.1997) (employer's enrichment by retention of profits realized from former employee's inventions was not unjust because employment contract provided for assignation of employee's inventions to employer).

"Nevertheless, 'when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice.' *Klein v. Arkoma Production Co.*, 73 F.3d 779, 786 (8th Cir.), cert. denied sub nom. *Jones v. Klein*, 519 U.S. 815, 117 S.Ct. 65, 136 L.Ed.2d 27 (1996); see also *Rent–A–PC, Inc. v. Rental Management, Inc.*, 96 Conn.App. 600, 606, 901 A.2d 720 (2006) ('the existence of a contract, in itself, does not preclude equitable relief *which is not inconsistent with the contract' ...*); *Porter v. Hu*, 116 Haw. 42, 54, 169 P.3d 994 (App.2007) ('[w]hile it is stated that an action for unjust enrichment cannot lie in the face of an express contract, a contract does not preclude restitution if it does not address the specific benefit at issue'), cert. denied, 117 Haw. 321, 179 P.3d 263 (2008); 66 Am.Jur.2d 622, *supra,* § 25 ('[a]lthough there can be no implied contract on a point fully covered by an express contract and in direct conflict therewith, there may be an implied contract on a point not covered by an express contract'); 1 G. Palmer, Restitution (1978) § 1.2, p. 8 ('[s]ome of quasicontract's most important work is done in cases in which there was an express contract between the parties')." (Emphasis in original.) *New Hartford v. Connecticut Resources Recovery Authority*, 291 Conn. 433, 455–56, 970 A.2d 592 (2009). Therefore, the plaintiff's unjust enrichment count is not barred by the fact that there was an express contract between Trenwick and W.R. Berkley.

In the present case, the court agrees with the plaintiff that "[t]here is no prospective remedy in the relationship between Trenwick and Berkley other than obtaining a declaration of the parties' rights under the [c]ommutation [a]greement." (Plaintiff's posttrial brief, October 29, 2010, p. 21.)

D

Special Defenses as to Count Two

Voluntary Payment

The plaintiff argues that in unjust enrichment actions, "[r]ecovery is not barred in cases where a plaintiff has voluntarily made payments to a defendant." (Plaintiff's posthearing brief, October 29, 2010, p. 21.) The defendants counter that where a plaintiff makes a voluntary payment, even when the plaintiff was not required to do so, if that plaintiff had knowledge of the material facts, the plaintiff cannot recover the money. According to the defendants, "[w]here a plaintiff makes a payment voluntarily, without coercion and without protest, the plaintiff's right to recovery is dependent upon a showing of (1) a mistake of fact and (2) *lack of knowledge or means of knowledge thereof as would permit recovery notwithstanding the voluntary payment*." (Emphasis in original.) (Defendants' posthearing brief, October 29, 2010, p. 28.) The

defendants assert that the evidence conclusively shows that Trenwick voluntarily made the payments and to the extent that the plaintiff's position is that its SCARF II obligations were commuted, it had the ability to reach that conclusion prior to 2008 when Eisenmann first stated his opinion on the subject.

The plaintiff cites to *Gilpatric v. Hartford*, 98 Conn. 471, 480, 120 A. 317 (1923) for the proposition that "[r]ecovery is not barred in cases where the plaintiff has voluntarily made payments to a defendant under the mistaken belief that the defendant was entitled to such payments." (Plaintiff's posthearing brief, October 29, 2010, p. 21.) The following facts were alleged in the complaint in *Gilpatric*. In *Gilpatric,* the decedent, a Suffield resident, left shares of capital stock of various insurance companies, who were defendants in the case, to the Hartford–Connecticut Trust Company, located in Hartford and also a defendant in the action, in trust. *Gilpatric v. Hartford, supra,* 472.

In addition, the following facts are alleged in *Gilpatric*. In 1919, 1920 and 1921, the defendant insurance companies, based on information provided by the defendant trust company, reported to Connecticut's tax commissioner that the trust company was the owner of those stock shares for purposes of taxation pursuant to General Statutes §§ 1201 and 1205. *Gilpatric v. Hartford, supra,* 98 Conn. 473. The state treasurer then remitted these funds to the city of Hartford. *Id*. The funds were remitted to Hartford due to a mistake and should have been remitted to the town of Suffield instead. *Id*. The plaintiffs claimed an order directing the defendant insurance companies and the trust company to stop reporting to the tax commissioner that the shares' owner's residence is in Hartford and a judgment against Hartford for the amount of taxes it received along with interest. *Id*. Hartford demurred, *inter alia,* on the ground that it had used the money paid to it under either a mistake of law or through the plaintiffs' negligence and could not be compelled to return this money. *Id.,* 474.

"[General Statutes §] 1201 requires the proper officer of every insurance company to report annually to the tax commissioner 'the name and residence of each stockholder,' the number of shares 'owned' by each on October 1st, and to pay the State treasurer a tax of one per centum on the fair market value of each share." *Gilpatric v. Hartford, supra,* 98 Conn. 475. [General Statutes §] 1205 "requires the State treasurer to remit to each town or city treasurer, on or before April 15th in each year, the amount of the tax received from such shares of each insurance company as were owned, on October 15th of the preceding years, by persons who resided or corporations which were located in such town or city, 'or if owned by the estate of a deceased person, whether held in trust or otherwise, then to the treasurer of the town or city wherein the decedent resided at the time of his death.' " *Gilpatric v. Hartford, supra,* 476. At issue in *Gilpatric* was the demurrer of the trust company and the first ground of Hartford's demurrer which pertained to the construction of General Statutes § 1205. *Gilpatric v. Hartford, supra,* 476. The question was whether the stock shares were owned by the trust company, a corporation located in Hartford, or the estate of the decedent, who was a Suffield resident at the time of his death. *Id*. The Supreme Court determined that the state treasurer should have remitted the funds to Suffield, not Hartford. *Id.,* 476–80.

Hartford's next ground for demurrer in that case was that it should not have to repay the money it received by mistake. *Id.,* 473–74, 480. The Supreme Court did not agree with Hartford, stating: "Our rule as to recovery of money paid under a mistake has long been well-settled. The payor must act under a mistake of his rights and duties, and be free from any moral or legal obligation to make the payment; and the payee must in good conscience have no right to retain it. When these conditions exist the money may be recovered whether it was paid under mistake of fact or of law. *Northrop v. Graves,* 19 Conn. 548 [(1849)]. The case made by the complaint satisfies these conditions. The State treasurer was not only under no obligation to pay these taxes to the City of Hartford, but was under an obligation not to do so, though by mistake he misconceived his statutory duty. In this respect the case at bar is closely paralleled by *Northrop v. Graves, supra,* where an executor who mistakenly paid a legacy to the wrong person was allowed to recover it.

"It seems equally clear that the City of Hartford has no shadow of right in good conscience to retain these taxes. Neither the mistake of the State treasurer in paying, nor its own good faith in receiving them, nor the fact (in respect of which the demurrer 'speaks') that the money has been spent, gives it any equitable right to retain moneys which, as this ground of demurrer admits, belong to the town of Suffield. If it were necessary to do so it might also be important to comment on the fact that the State treasurer was not

dealing with his own funds but with public moneys of the State, in which it would appear to be especially difficult for any municipality to acquire equitable rights inconsistent with the statute governing their distribution. See, in this connection, *Northrop v. Graves, supra,* at page 560, where the question is suggested whether payments made by mistake of an executor out of funds of the estate stand on the same footing as if he were dealing with his own funds." *Gilpatric v. Hartford, supra,* 98 Conn. 480–81.

Notwithstanding, the language utilized by the Supreme Court in *Gilpatric* regarding the requirement to return voluntary payments made in error, the Supreme Court in *Rockwell v. New Departure Mfg. Co.*, 102 Conn. 255, 128 A. 302 (1925), carved out an exception where voluntary payments made in error did not have to be repaid. In *Rockwell,* the plaintiff was employed by the defendant corporation. *Id.*, 259. The plaintiff and the defendant entered into an agreement concerning the duties that the plaintiff would provide to the defendant and the compensation the defendant would award to the plaintiff for his services and for the royalties from the sale of articles containing the plaintiff's inventions. *Id.*, 261–67.

Charles T. Treadway, the then treasurer of the defendant, without examining the contract, instructed the bookkeeper to credit the plaintiff's account with royalties from the net sale proceeds of both single and double row bearings. *Id.*, 263–64, 273. Both the defendant and the plaintiff believed that the plaintiff was entitled to the royalties from the proceeds of sales of single row bearings, and the defendant was aware that the plaintiff was receiving these payments. *Id.* The defendant made these payments for the single row bearings because of a mistake that the defendant did not discover until 1914. *Id.*, 273–74.

The working relationship between the plaintiff and the defendant subsequently soured and around September of 1914, Treadway, who by then had became the chairman of the board of the defendant, examined the agreements between the plaintiff arid the defendant. *Id.*, 274–77. On November 21, 1914, Treadway wrote the plaintiff that on October 7, 1914, the defendant would cease crediting the plaintiff with commissions on certain articles including articles embodying single row bearings. *Id.*, 278. The defendant's accounting department on November 18, 1914, charged back $1,170.11 on the plaintiff's account for the payments for single row bearings and did not pay the plaintiff anything more for the sale of single row bearings. *Id.*

The trial court found that the plaintiff was not entitled to royalties from the sale of single row bearings and that the defendant was entitled to recover from the plaintiff any money the defendant paid to him as royalties for the sale of single row bearings. *Id.*, 282–83. The Supreme Court did not agree with the trial court's holding that the defendant was entitled "to recover back the commissions paid on single row bearings, as money paid under a mistake." *Id.*, 306–07.

The Supreme Court stated: "We find ourselves unable to agree with this ruling, because we are of opinion that the subordinate facts found are inconsistent with the existence of the kind of a mistake in respect of which equity will grant affirmative relief. Briefly, the parties stood on an equal footing, each having access to his own copy of the written contract, upon the true interpretation of which the existence of a debatable legal obligation depended. If Treadway, after consulting the writing, had deliberately agreed to plaintiff's interpretation of its terms, the payments of commissions on single row bearings would doubtless have been made under a mistake as to the legal effect of the document regarded as the sole expression of the intent of the parties. Yet it would then be idle to say that they were not voluntary payments, or that they might be recovered as money paid under a mistake of law. On the contrary, defendant would in such case be bound by consenting to a practical interpretation of its own contract which was within the limits of its possible construction. And while the fact that Treadway, the treasurer, acquiesced in the debatable claim of plaintiff, without looking at the contract, solely because he took it for granted that plaintiff was probably right about it, relieves defendant from the consequences of a deliberate and intentional assent to plaintiff's construction, it does not make the payments in question any the less voluntary in character, or impose upon plaintiff, who made his claim in good faith and still pursues it in good faith, any equitable obligation to refund the payments. In so holding, we do not question or weaken the authority of *Northrop v. Graves*, 19 Conn. 548 [(1849)], and our many other decisions holding that money paid under a mistake of fact or of law, which the recipient has no right in good conscience to retain, may be recovered back. *We do hold that when the parties to a written contract stand on an equal footing as to means of knowledge of their contract obligations, money paid by one to the other, in part performance of the contract, in response to a claim*

made in good faith and based upon a permissible but erroneous construction of the contract, cannot be recovered back as money paid under a mistake of law." (Emphasis added.) *Rockwell v. New Departure Mfg. Co., supra,* 102 Conn. 306–08.

Furthermore, Corpus Juris Secundum states: "Except where it is provided otherwise by statute, where a person acting under a mistake of law, or in ignorance of the law but with full knowledge of all the facts, and in the absence of fraud or improper conduct on the part of the payee, voluntarily and without compulsion pays money on a demand not legally enforceable against him or her, he or she cannot recover it.

"Where the stated rule applies, ordinarily no difference is recognized, as far as the right to recover a voluntary payment is concerned, between ignorance and mistake of law. The rule applies to corporations as well as to natural persons.

"There is some authority, however, that a recovery of money paid under a pure mistake of law, or in ignorance of the law, will be allowed where in equity and in good conscience the payee had no right to retain it, as when the mistake is induced or accompanied by inequitable conduct of the other party.

" *Money paid voluntarily, although under a mistake of law as to be the interpretation of a contract, cannot be recovered*." (Emphasis added.) 70 C.J.S. 99–100, Payment § 121 (2005).

The holding of *Rockwell* and the statements contained in the Corpus Juris Secundum are applicable to the facts of the present case in that Trenwick was on equal footing with W.R. Berkley as to the commutation agreement and with W.R. Berkley's subsidiary, Berkley, which was the successor to Signet Star as to SCARF II, with regard to knowledge of their respective contractual obligations under the respective agreements. Trenwick paid money to Berkley under SCARF II based on its mistaken interpretation of the commutation agreement though Trenwick had the means to ascertain the correct interpretation of the commutation agreement earlier. Therefore, pursuant to *Rockwell,* the defendants' special defense of voluntary payment defeats any claim the plaintiff might have as to unjust enrichment. Accordingly, judgment enters in favor of the defendants as to count two of the operative complaint.

IV

CONCLUSION

As to count one, the court enters a declaratory judgment declaring that the commutation agreements commuted SCARF II. As to count two, the unjust enrichment count, judgment is entered for the defendants.

Cremins, J.

Superior Court Judge