

MALCOLM CUSHING

v.

EDWIN BERRY et al.

Submitted on Briefs November 26, 2002
Decided December 20, 2002

Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA, ALEXANDER,
CALKINS, and LEVY, JJ.

MEMORANDUM OF DECISION

Malcolm Cushing appeals from a judgment entered in the Superior Court (Penobscot County, *Hjelm, J.*) in favor of defendants Edwin and Edith Berry on Cushing's complaint for breach of contract. Contrary to Cushing's contention, the Superior Court's conclusion that the parties had failed to reach a meeting of the minds concerning a covenant not to compete was not clearly erroneous. *See Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66, 73 (Me. 1974) (ruling that where the writings and actions of parties to a contract are ambiguous, existence of contract terms is a question of fact). Further, it was not an abuse of discretion for

the Superior Court to deny Cushing's motion to amend the pleadings pursuant to M.R. Civ. P. 15(b). *See Bernier v. Merrill Air Engin'rs*, 2001 ME 17, ¶ 24, 770 A.2d 97, 105 ("The mere fact that evidence presented . . . may incidentally tend to prove another fact not put in issue does not give rise to the application of Rule 15(b) and support a claim that the issue was tried by consent . . .").

The entry is:

Judgment affirmed.

Attorney for plaintiff:

Donald F. Brown, Esq.
36 Penn Plaza
Bangor, ME 04401

Attorney for defendants:

James W. Strong, Esq.
Strong & Hokkanen
P O Box 56
Thomaston, ME 04861