

IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA

CARL F. WEEDER and BARBARA WEEDER,

Plaintiffs,

vs.

ROBERT E. COURTNEY and MARVENE E. COURTNEY,

Defendants.

Case No. 4676

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

DATE OF HEARING: April 16, 2001.
DATE OF RENDITION: May 3, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: In chambers at O'Neill, Nebraska.
APPEARANCES:
For plaintiffs: Lyle Joseph Koenig.
For defendants: Thomas H. DeLay.
SUBJECT OF ORDER: Defendants' motion for partial summary judgment.
PROCEEDINGS: See journal entry filed April 23, 2001.
FINDINGS: The court finds and concludes that:

1. The plaintiffs are tenants under a written lease. Their petition seeks a declaratory judgment and damages against the defendants, who are the owners of the leased property. The plaintiffs claim the defendants failed to negotiate rentals as required by the lease. The defendants have counterclaimed for ejectment. The defendants motion for partial summary judgment seeks a determination regarding the legal effect of the written lease provisions regarding periodic renegotiation of the rent.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, ___ N.W.2d ___ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

3. The defendants requested the court to take judicial notice of the plaintiffs' second amended petition with the attached lease agreement, and offered Exhibit 1 for that purpose. The plaintiffs offered no evidence. The interpretation of a written contract constitutes an issue of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Consequently, there is no issue of fact and the court determines the issue as a matter of law.

4. The lease provides, in pertinent part, as follows:

The annual rent . . . *for the first three years of this lease* shall be \$4.00 per foot of river frontage, or \$200.00 per year . . . , which shall be due and payable on or before the 23rd day of April, 1987, and on like day and month of each consecutive year thereafter.

The *term of this lease shall be 20 years*, beginning April 23, 1987, and ending April 23, 2007. This lease shall be renewable at the end of said 20 year period provided that [plaintiffs] notif[y] [defendants] of [plaintiffs'] intent to renew this lease 30

days or more prior to the termination of the lease. The annual rent shall be subject to renegotiation on April 23, 1990, and the *annual rent figure mutually agreed upon on that date shall be controlling for the subsequent five year period*. Annual rent shall be re-negotiated every five years for the remainder of this lease.

Exhibit 1at 5-6 (emphasis supplied).

5. The defendants contend that the renegotiation provision constitutes an unenforceable agreement to agree, relying upon *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 351 N.W.2d 414 (1984). In response, the plaintiffs cite *T.V. Transmission, Inc. v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49 (1985). The present case falls in between the factual circumstances of those cases.

6. *R.A.S.* considered an option to extend the lease. The present lease purports to state of fixed term of 20 years, within which the rent would be renegotiated at 5-year intervals. The Supreme Court held that the renewal option was unenforceable. On the other hand, the *T.V. Transmission* lease provided for periodic rental adjustment negotiations within the overall stated term, as does the lease in the present case. But in *T.V. Transmission*, the lease stated an initial rental applicable to the entire lease term. The Supreme Court held that the lease was enforceable for the stated term at the stated price despite the parties' inability to agree upon any adjustment. In effect, the court held the modification provision void and unenforceable as an agreement to agree. The present lease states an explicit rental rate expressly applicable only to the first three years of the lease.

7. In *T.V. Transmission*, the court cited *Alward v. United Mineral Products Co.*, 197 Neb. 658, 250 N.W.2d 623 (1977), for the proposition that where an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. Consistently, the Supreme Court stated in *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985), that where an agreement not covered by the Uniform Commercial Code stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.

8. Where the amount of rent is not agreed upon and the contract does not otherwise provide a manner for its *definite* determination, the contract is void for uncertainty. 49 AM. JUR. 2D *Landlord and Tenant* § 25 (1995) (emphasis supplied).

9. In the present case, the lease was initially binding and enforceable for the three-year period stating a definite rent. The court infers from the allegations of the operative petition that the negotiations in 1990 and 1995 resulted in agreement upon an annual rental amount, regardless of whether the amount changed, applicable to the respective five-year periods. When the parties reached those agreements, they settled the rental price for those periods. Those agreements rendered the lease binding and enforceable for those additional periods.

10. The question then becomes what consequences follow. When they filed this action, the plaintiffs tendered the amount of the rent required by the defendants at the time of renegotiation in 2000. That action clearly manifests the plaintiffs' intent to continue the lease term, and to accept, if necessary, the rental price demanded by the defendants.

11. The procedural posture of this case makes a definitive ruling on the motion difficult. The defendants request partial summary judgment "on the issue whether the written contract . . . is an enforceable lease for a term of years or an unenforceable agreement to agree." The motion contemplates an "either or" determination which is not appropriate under the undisputed facts shown by the plaintiff's second amended petition. The above discussion sets forth the court's determination that the enforcement of the five-year renegotiation periods only becomes effective when settled by later agreement. Because the deposit of rent manifests an intention to accept the plaintiffs' offered rental price, the relief cannot be granted in the manner posed by the defendants. Accordingly, the motion for summary judgment should be denied.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendants' motion for partial summary judgment is denied.

Signed in chambers at Ainsworth, Nebraska, on May 3, 2001.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Motion for Partial Summary Judgment" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge