

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

INTERLOCUTORY ORDER

DATE OF HEARING: September 10, 2001.

DATE OF RENDITION: December 12, 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: Reciprocal motions for judgment on the pleadings and for summary judgment.

PROCEEDINGS: See journal entry entered September 14, 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.

2. Previously, the defendants moved for partial summary judgment. For reasons related to the specific relief requested in the motion, the court denied that motion. The court thereafter scheduled a final pretrial conference. At final pretrial conference, it appeared from the discussion with counsel that purely legal issues were presented. The parties thus agreed to verbally make reciprocal motions for

judgment on the pleadings and for summary judgment, waiving all issues of notice thereon. Such motions were made on the record. The court specifically noted the pleadings of which it took judicial notice, and also received the parties' stipulation regarding the deposit of funds with the clerk by the plaintiffs.

3. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000).

4. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (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.

5. 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, to the extent that there is no issue of fact, the court determines the issue as a matter of law.

6. 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 re-negotiation 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 A to plaintiff's second amended petition (emphasis supplied).

7. 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.

8. *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.

9. 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.

10. 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).

11. 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.

12. The plaintiffs urge the court to enforce the 20-year-term provision of the lease by “enter[ing] an order saying that the rental is the last rental that the parties agreed upon.” Plaintiff’s reply letter brief. They further argue that if the defendants “do not like that result, they can negotiate the rental, which heretofore they have refused to do.” *Id.* The problem with the plaintiffs’ argument is that this court would thereby modify an express term of the written agreement, by making the price provision effectively read “for the subsequent five[-] year period *and thereafter until the parties agree to change the rent.*” That is not what the parties agreed. The parties agreed to a stipulated rent for three years. The agreement to agree for the next two five-year periods became specific and definite upon the parties’ later agreement to a specific rent. When the parties failed to agree as to a specific rent for the next five-year period, they failed to make the price term specific and definite. It thereby remained an unenforceable agreement to agree. By severing the agreement to agree, the court is left with an agreement that fails to specify an essential term, namely the price.

13. The plaintiffs argue that the court is thereby granting the defendants a unilateral right to terminate the lease or to unilaterally increase the rent. However, the court is not remaking the parties’ agreement. When the parties fail to agree as to the next five-year period rental price, it is *the parties’*

action that renders *their* agreement unenforceable. The consequence that the agreement fails to be enforceable if the parties fail to agree upon the subsequent period rentals inheres in the contract negotiated by the parties. This court merely implements the consequences that flow from the parties' initial choices and their subsequent supplemental agreements and ultimate failure to agree.

14. The question then becomes what consequences follow. When they filed this action, the plaintiffs deposited with the court clerk the amount of the rent required by the defendants at the time of renegotiation in 2000. During the pendency of this action, the plaintiffs deposited a second year's rent with the court clerk.

15. The defendants contend that such constituted a tender of the rent no different than if the plaintiffs had paid the disputed rent directly to the defendants. The defendants then argue that such tender renders the case moot. The plaintiffs strenuously disagree, maintaining that such funds were paid to the clerk only to preclude any breach of the agreement should the defendants' interpretation of the contract prevail.

16. The court rejects the defendants' contention that the matter is moot, or, stated another way, that there is no justiciable issue for declaratory judgment. The parties present radically different interpretations of the contract, from which flow consequences that remain of importance to the parties. Those issues are not terminated by the deposit of the rent due on April 23, 2000, with the original petition, nor the subsequent deposit of the rent due on April 23, 2001, during the pendency of this action. Those actions merely preserve the status quo during the pendency of the action. They do not manifest the plaintiffs' confession of the defendants' contractual interpretations. Indeed, the arguments make clear that those differences remain unresolved until disposed by this court.

17. Those actions do, however, clearly manifest the plaintiffs' intent not to default the requirements of the lease as ultimately interpreted by this court. And in view of the court's determination of the respective rights of the parties, such actions also effectively elect to accept the defendants' rental demand for the five-year period from April 23, 2000, to April 23, 2005. To declare otherwise would effectively allow the plaintiffs to vary the period of rental price agreement from five-year periods to single-year periods. This court cannot affirmatively modify the parties' agreement. Thus, one of the

consequences of depositing the disputed rental amount was to accept the defendants' demanded price if the plaintiffs' interpretation turned out to be erroneous.

18. The plaintiffs are entitled to relief on their cause of action for declaratory relief declaring the rights and liabilities of the parties under the contract. That relief will not be the particular result the plaintiffs desired, but such relief nevertheless represents the relief to which they are entitled. Thus, the plaintiffs' motions for judgment on the pleadings and summary judgment should be granted on the first cause of action of the second amended petition to the extent of granting a declaration of rights, but otherwise denied. The defendants' motions for judgment on the pleadings and summary judgment should be granted to the extent of the determinations sought by their answer to the first cause of action and otherwise denied. The declarations constitute interlocutory relief for reasons that follow.

19. At the hearing on the motions for judgment on the pleadings and summary judgment, the parties utterly failed to focus this court's attention upon the nature of the plaintiffs' claim in the second cause of action. In that second cause of action, the plaintiffs allege that although the lease provides for a tract 60 by 100 feet in size, they have only been provided a 50 by 100 feet tract. The defendants' answer denies that allegation.

20. However sincerely this court might desire to finally dispose of this case, the second cause of action cannot be disposed by motions for judgment on the pleadings or summary judgment. Neither party introduced any evidence addressing the issue. Thus, the plaintiffs failed to meet their burden to show that they are entitled to judgment as a matter of law in regard to their motion for summary judgment. Similarly, the defendants failed to meet their burden to show that they are entitled to judgment as a matter of law on their motion for summary judgment. Both motions for summary judgment must be denied in regard to the plaintiffs' second cause of action.

21. The motions for judgment on the pleadings afford no better result. On the plaintiffs' motion, the motion effectively admits the denials of the defendants' answer and admits for purposes of the motion the untruth of the plaintiffs' allegations in the second amended petition. Thus, the plaintiffs' motion for judgment on the pleadings fails with regard to the second cause of action. On the defendants' motion, the motion effectively admits the allegations of the plaintiffs' second amended petition and admits for purposes of the motion the untruth of the defendants' denials in their answer. The defendants' motion also fails. The

issues on the second cause of action cannot be determined as a matter of law, and require a trial for resolution.

22. Given the court's declaration of the contractual rights and liabilities of the parties, the defendants' counterclaim for ejectment clearly fails because of the tender of the disputed rent to the court clerk. The plaintiffs' motion for judgment on the pleadings and for summary judgment must be granted and interlocutory judgment rendered dismissing the defendants' counterclaim.

ORDER: IT IS THEREFORE ORDERED that:

1. The respective motions for judgment on the pleadings and for summary judgment are granted to the extent consistent with the relief granted in this interlocutory order, and are denied to the extent inconsistent with the relief granted.

2. Interlocutory judgment is rendered on the plaintiff's first cause of action for declaratory judgment declaring the rights and liabilities of the parties as follows:

a. The lease agreement dated April 23, 1987, was valid and enforceable, and performed by the parties, for the initial three-year period for which the rental price was expressly stipulated by the written lease.

b. The 1990 agreement of the parties regarding the rental price for the five-year period from April 23, 1990, to April 23, 1995, rendered the lease binding and enforceable for the additional five-year period, and was performed by the parties except as to the undetermined resolution of the claim in plaintiffs' second cause of action.

c. The 1995 agreement of the parties regarding the rental price for the five-year period from April 23, 1995, to April 23, 2000, rendered the lease binding and enforceable for the additional five-year period, and was performed by the parties except as to the undetermined resolution of the claim in plaintiffs' second cause of action.

d. The parties' failure to agree to a different rental than that demanded by the defendants rendered the rental price for the five-year period from April 23, 2000, to April 23, 2005, indefinite.

e. When the indefinite and unenforceable agreement to agree on price is severed from the agreement, the balance of the least became unenforceable except for the plaintiffs' deposit of the annual rental installments during the pendency of the action.

f. The plaintiffs' deposit of the rental amounts demanded by the defendants constituted the plaintiffs' conditional acceptance of the defendants' offer to determine the rent for the five-year period from April 23, 2000, to April 23, 2005, at the amount of \$2,240.00 per year, that acceptance being conditioned upon the court's determination of the parties' rights and liabilities.

g. Upon this court's determination of the rights and liabilities of the parties becoming final, that is, upon the subsequent entry of final judgment after resolution of the plaintiffs' second cause of action and upon the expiration of time for appeal from that final judgment, the conditional acceptance becomes final, and the parties are deemed in law to have agreed to settle the rent at the rental price of \$2,240.00 per year, for the said five-year period.

h. The final judgment will direct that, upon the expiration of time for appeal without any notice of appeal being filed (i.e., no notice of appeal is filed within 30 days after the clerk's date of filing of the subsequent final judgment), the Clerk of the District Court of Boyd County, Nebraska, would be directed to pay over to the defendants the sums deposited by the plaintiffs together with any interest accrued thereon and realized by the clerk while on deposit.

3. Interlocutory judgment is rendered on the defendants' counterclaim dismissing the counterclaim with prejudice as to events occurring prior to the date of this interlocutory judgment.

4. All of the relief granted in paragraphs 2 and 3 above is interlocutory in character, and remains subject to modification by the court without further notice or hearing at any time prior to entry of final judgment.

5. All motions for judgment on the pleadings and for summary judgment are denied as to the plaintiffs' second cause of action of the second amended petition. The matters arising by reason of such allegations and the defendants' denials thereof are assigned for final pretrial conference on **Monday, January 28, 2002, at 1:40 p.m.**, or as soon thereafter as the same may be heard, in chambers at the District Judge's chambers, Holt County Courthouse, **O'Neill**, Nebraska, subject to the requirements of

the previous orders setting final pretrial conference. The parties are cautioned that discovery must be completed, and the matter ready for trial, by the date of the final pretrial conference.

Signed in chambers at **Ainsworth**, Nebraska, on **December 12, 2001**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- ⋮ Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- ⋮ Note the decision on the trial docket as: [date of filing] **Signed "Interlocutory Order"**
entered
Done on _____, 20____ by _____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- 9 Enter judgment on the judgment record.
Done on _____, 20____ by _____.

Mailed to:

William B. Cassel
District Judge