

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

JUDGMENT

DATE OF HEARING: October 20, 2003, at District Courtroom, Holt County Courthouse, O’Neill, Nebraska.

DATE OF RENDITION: November 20, 2003.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs:

Lyle Joseph Koenig without plaintiffs.

For defendants:

Thomas H. DeLay with defendants.

SUBJECT OF ORDER: Defendants’ motion for summary judgment.

PROCEEDINGS: See journal entry rendered following hearing.

FINDINGS: The court finds and concludes that:

1. Initially, this court granted interlocutory summary judgment for defendants on the plaintiffs’ first cause of action and for plaintiffs on the defendants’ counterclaim. After the plaintiffs dismissed the second cause of action of their operative petition, this court entered a final judgment incorporating the interlocutory determinations. The plaintiffs appealed. The Nebraska Supreme Court reversed the grant of summary judgment on the plaintiffs’ first cause of action and remanded for further proceedings consistent with the Supreme Court opinion.

2. The Supreme Court opinion stated that “[t]he district court’s determinations with regard to appellees’ counterclaim for ejectment and with regard to the significance of

appellants' deposit of two-years' rent at the rate set by appellees in their February 15, 2000, letter were not appealed, and these determinations remain undisturbed on appeal." *Weeder v. Courtney*, case No. S-02-331 (memorandum opinion), at 8.

3. The defendants have again moved for summary judgment on the plaintiffs' surviving first cause of action. The parties presented evidence at the hearing. This court took the matter under advisement.

4. The plaintiffs are tenants under a written lease. The surviving first cause of action of their petition seeks a declaratory judgment 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.

5. 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.

6. 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, because there is no issue of fact, the court determines the issue as a matter of law.

7. 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).

8. 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.

9. *Crowley* 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 in *Crowley* 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.

10. 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.

11. 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).

12. 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, unspecified in the petition, 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.

13. The plaintiffs have previously suggested that this court should enforce the 20-year-term provision of the lease by entering an order saying that the rental is the last rental that the parties agreed upon. Such determination would effectively modify an express term of the written agreement to 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.

14. The plaintiffs have argued that this 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.

15. The plaintiffs now assert the existence of an issue of fact. This court disagrees. The partial invalidity of the parties' contract because of uncertainty does not render the contract ambiguous. *T.V. Transmission, Inc. v. City of Lincoln, supra*. Consequently, such factual matters concerning who drafted the contract and the parties' motivations regarding the conduct of negotiations make no difference. Rules of construction are not applicable unless the contract is ambiguous. *American Family Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

16. The plaintiffs' first cause of action sought declaratory relief declaring the rights and liabilities of the parties under the contract. The defendants are entitled to summary judgment because the proper interpretation of this unambiguous contract constitutes a matter of law. The defendants' motion for summary judgment should be granted and summary judgment should be rendered accordingly.

17. Because of the plaintiffs' dismissal of their second cause of action and the status of this court's prior ruling on the defendants' counterclaim as the law of the case, the disposition of the plaintiffs' first cause of action on summary judgment constitutes a final judgment.

18. 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 defendants are entitled to judgment as a matter of law on the plaintiffs' first cause of action.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The defendants' motion for summary judgment is granted.
2. Judgment is rendered on the plaintiff's first cause of action of their second amended petition 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.
 - 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.
 - 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.
3. The prior determinations of this court with regard to defendants' counterclaim for ejectment and with regard to the significance of plaintiffs' deposit of two-years' rent at the rate set by defendants in their February 15, 2000, constitute the law of the case.
4. Plaintiffs' costs are taxed to plaintiffs. Defendants' costs are taxed to defendants.
5. Any claim for relief not expressly disposed above is denied. All requests for attorneys' fees, express or implied, are denied. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **November 20, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

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

Mailed to:

BY THE COURT:

William B. Cassel
District Judge