COURT OF APPEALS DECISION DATED AND FILED

May 21, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1406

Cir. Ct. No. 2007CV25

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

THOMAS STEFFEN, D/B/A STEFFEN BROTHER'S PARTNERSHIP,
DANIEL STEFFEN, D/B/A STEFFEN BROTHER'S PARTNERSHIP AND
PATRICK STEFFEN, D/B/A STEFFEN BROTHER'S PARTNERSHIP,

PLAINTIFFS-APPELLANTS,

V.

DAN DUMKE, D/B/A D & D PARTNERSHIP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Reversed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 NEUBAUER, J. Thomas, Daniel and Patrick Steffen, d/b/a Steffen Brother's Partnership, sought a declaration of their rights to cropland they own

and for years have leased to Dan Dumke, d/b/a D & D Partnership. Steffen Brother's appeals the order declaring valid a written two-year lease option and ordering the parties to negotiate a fair per-acre rental price. Because the lease option failed to include an essential term, we conclude that the provision is unenforceable. We reverse the trial court's order.

¶2 The undisputed facts are these. D & D has continuously leased a 158-acre parcel of Green Lake county cropland since 1986 through a series of seven written contracts.[1] The first four leases, drafted on preprinted lease forms, were for three-year terms. Beginning in 1998, the next three typewritten "Land Lease Agreements" described two-year lease terms. All seven leases, including the December 2002 agreement, contained this clause:

> Lessee shall have an option of an additional 2 year lease[] after the expiration of this lease. The price of the additional 2 year lease shall be negotiated at the time of the new lease.

Near the end of each lease term, the parties negotiated the rent and drew up a new agreement. The price fluctuated between $95 and $115 an acre.

¶3 In December 2004, the parties signed the document at issue here, a handwritten "Land Lease Extension" which lessee D & D drafted. It provided in full:

> 158 acres cropland—Towns of Mackford & Green Lake
>
> 18,170 annual rent; total <u>$36,340.</u>
>
> Land Lease Extension

[1] The first three leases were between D & D and Cholice Steffen, the Steffen family matriarch. The fourth, in 1996, listed Tom Steffen's name along with Cholice's. The rest have been between Steffen Brother's and D & D.

> This extends the Dec. 31, 2002, lease for another 2-year period. The 2005, 2006 growing season.
>
> All the terms and payments remain the same as said 12-31-02 lease.
>
> signed Steffen Bros.
>
> /s/ Tom Steffen date 12-5-04
>
> Signed: D & D Partnership
>
> /s/ Dan Dumke, Partner
>
> date 12-04-04

D & D leased and farmed the land through 2006 at the same rent as in the December 2002 lease.

¶4 D & D asserts that at the close of the 2005-06 lease period, Steffen Brother's told D & D it did not intend to enter further leases with it. By letter dated January 27, 2007, D & D formally notified Steffen Brother's that it intended to exercise the additional two-year option D & D believed the December 2004 agreement incorporated by reference. Steffen Brother's, evidently seeing things otherwise, filed an action for declaratory judgment and soon after moved for summary judgment. Each party filed a memorandum in support of declaratory judgment in its own favor, and D & D filed an affidavit of Dan Dumke as to the history of the lease agreement. The trial court approached the matter as an action for declaratory judgment. The court was satisfied that the 2004 extension incorporated all of the terms of the December 2002 lease, including the right to extend for two more years and ordered the parties to negotiate a fair rental amount per acre for the additional two-year option period. Steffen Brother's appeals.

DISCUSSION

¶5 The grant or denial of a declaratory judgment is addressed to the trial court's discretion. ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. However, when the exercise of such discretion turns upon a question of law, our review is de novo. ***Id***. The issue here involves the construction of a lease, which presents a question of law. ***Chase Lumber and Fuel Co., Inc. v. Chase***, 228 Wis. 2d 179, 191, 596 N.W.2d 840 (Ct. App. 1999). When interpreting a lease, it is not a court's job either to make contracts or to reform them. ***Sampson Invs. v. Jondex Corp***., 176 Wis. 2d 55, 62, 499 N.W.2d 177 (1993). Rather, the court must determine what the parties contracted to do—"not necessarily what they intended to agree to, but what, in a legal sense, they did agree to," as shown by the language they chose to use. ***Id.*** (citation omitted). A contract must be definite as to the parties' basic commitments and obligations. ***Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). We may decide as a matter of law whether the essential terms of the contract were definite. ***Id.***

¶6 The first issue is whether the 2004 Land Lease Extension incorporates the option to extend the lease for an additional two years. The second is whether the option to renew, which provides that the price of the additional two-year lease is to be negotiated at the time of the new lease, is sufficiently definite to be enforceable.

1. 2004 Land Lease Extension

¶7 The issue here concerns the December 2004 Land Lease Extension the parties signed as the 2002 lease period drew to a close. Dumke contends that the provision "All the terms and payments remain the same as said 12-31-02

lease" incorporates by reference *all* terms of the prior lease, specifically the following:

> Lessee shall have an option of an additional 2 year lease[] after the expiration of this lease. The price of the additional 2 year lease shall be negotiated at the time of the new lease.

Dumke points out that the option *was* included in every prior contract the parties negotiated, and as such, the 2004 agreement to keep "[a]ll the terms" also contemplated the option to renew. Steffen Brother's argues that, on its face, the 2004 agreement did not include an option to renew, a fact it considers significant when all previous leases expressly recited one. Steffen Brother's contends that the lease is ambiguous. The trial court was convinced that the 2004 extension, although informal, intended to incorporate all terms from the previous agreement, including the option to renew. We agree.

¶8 "[T]he cornerstone of contract construction is to ascertain the true intentions of the parties." ***State ex rel. Journal/Sentinel, Inc. v. Pleva*,** 155 Wis. 2d 704, 711, 456 N.W.2d 359, 362 (1990). Where the terms of a contract are clear and unambiguous, the court is to construe the contract according to its literal terms. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998).

¶9 Here, the 2004 document extends the lease for another two-year period, the 2005 and 2006 growing season. Beyond that, the parties agreed that "All the terms and payments remain the same as said 12-31-02 lease." The terms of the 12-31-02 lease included both a lease for two years (the 2003 and 2004 growing season) and an option to renew. The plain language of the agreement refers to *all* the terms, which included the two-year option to renew.

2. Definiteness of terms

¶10 Steffen Brother's contends that, if renewed, the lease fails for uncertainty because it provides no rental amount nor a formula to determine the rent, and a court may not set the terms. It argues that the option presents merely an agreement to agree, which does not create a binding obligation. The trial court found that the parties, indeed, had agreed to bind themselves, leaving only the matter of the price to be set through negotiation. Its order provided that the parties "shall negotiate a fair rental amount per acre for the additional 2 year option period."

¶11 To be enforceable, a contract's basic terms and requirements must be sufficiently definite and certain. *See* ***Metro. Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶22, 291 Wis. 2d 393, 717 N.W.2d 58. We may decide as a matter of law whether the essential terms of the contract were definite as to the parties' basic commitments and obligations. ***Mgmt. Computer Servs.***, 206 Wis. 2d at 178. In construing a lease renewal provision, it is well settled that the rental price and conditions of the new lease are essential terms of the contract. *See* ***Batavian Nat'l Bank v. S & H, Inc.***, 3 Wis. 2d 565, 569, 89 N.W.2d 309 (1958).

¶12 Steffen Brother's argues that the option clause in the 2004 Land Lease Extension fails for indefiniteness as a matter of law and cites several cases in support: ***Ratcliff v. Aspros***, 254 Wis. 126, 35 N.W.2d 217 (1948), ***Leider v. Schmidt***, 260 Wis. 273, 50 N.W.2d 233 (1951), and ***Batavian National Bank***, 3 Wis. 2d at 565. We agree with Steffen Brother's that, consistent with these lease cases, the renewal option with no amount for rent, or any procedure, method or standard for determining rent, is unenforceable.

¶13 In ***Ratcliff***, a written five-year lease gave lessees an option to extend the lease for five years "at rental and terms to be mutually agreed upon between the parties." ***Ratcliff***, 254 Wis. at 127. The supreme court held that the option provision was too indefinite and uncertain to be enforced where "no procedure is outlined, no method is indicated, and no standard is set up for determining the rental and terms of a new lease." ***Id.*** at 129. With no guidelines, the court could not write the contract or supply omissions. ***Id.***

¶14 Likewise, in ***Leider***, lessors granted lessees, who were leasing on a five-year term, an option of another five years "on terms and conditions to be agreed upon." ***Leider***, 260 Wis. at 273-74. The lessees gave timely notice of their intent to renew the lease at the same rent and lessors countered with a non-negotiable offer to renew at nearly twice the cost. ***Id.*** at 274. Looking to ***Ratcliff***, the supreme court held that the option provision was void as too indefinite and uncertain. ***Leider***, 260 Wis. at 275-76. The ***Leider*** court rejected the lessee's suggestion that the court has "the right to decree specific performance of the option clause at a reasonable rental to be determined by the court." ***Id***. at 275.

¶15 Finally, in ***Batavian National Bank***, a commercial real estate lease provided lessee an option to extend the lease "upon such terms and conditions as the Lessor and Lessee may agree upon." ***Batavian Nat'l Bank***, 3 Wis. 2d at 566. Under the original three-year lease, the parties had agreed to a stated rent and, after the first year, rentals were subject to revision depending upon lessee's sales and earnings and lessor's increased expenses. ***Id.*** The contract also granted lessee an option to extend the lease for an additional three years "upon such terms and conditions as the Lessor and Lessee may agree upon." ***Id.***

¶16 The supreme court in ***Batavian*** held that the option clause was too indefinite and uncertain to be enforced. ***Id.*** at 570. The ***Batavian*** court observed that the language providing for rental revisions based on lessee's "sales and earnings" did not specify what percentage of each component should govern, and reference to the lessor's "increased expenses" in no way limited or defined the lessor's "many and varied" expenses. ***Id.*** at 568. The court, rejecting the tenants' argument that the circuit court should have considered parole evidence to construe the option, reasoned that the clause failed not for "mere ambiguity but … an absence of essential provisions." ***Id.*** at 569.

¶17 D & D attempts to distinguish ***Ratcliff***, ***Leider***, and ***Batavian*** on the grounds that all involved an option to renew a single-term contract of commercial property whereas here, by contrast, the parties have a two-decade history of cropland leases and negotiations from which the court could glean the intent of the parties. However, the supreme court in ***Batavian*** expressly rejected the lessee's contention that the court could supply the missing terms and conditions by applying what courts in other states called "the rule of reason." ***Batavian***, 3 Wis. 2d at 569. The supreme court observed that at the time of its decision in ***Ratcliff***, it gave careful consideration to the differing rules and decided to adopt the majority rule that a lease must specify the terms and conditions of the renewal and extension so that the court may determine what has been agreed upon from the language therein. ***Batavian***, 3 Wis. 2d at 569. While ***Ratcliff***, ***Leider***, and

Batavian date back to the late 1940s and 1950s, there are no subsequent cases whereby the supreme court has abrogated its adoption of this rule.[2]

¶18 D & D relies on our decision in ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Group, Inc.***, 2004 WI App 134, ¶8, 275 Wis. 2d 349, 685 N.W.2d 564, in support of its contention that in the absence of a sales price or a method for determining it, the court may look to the conduct of the parties to cure any indefiniteness as to the price of an asset. However, our analysis in ***Herder Hallmark*** was directed to the existence of an implied purchase agreement, not the enforceability of a lease provision. ***Id***., ¶1. In that case, the parties had transferred business assets in the absence of an agreement as to sale price. The court held that the parties' conduct in the transfer and acceptance of assets evidenced sufficient definiteness of an intent to contract, even if the essential term of a sale price was left vague or indefinite. ***Id***., ¶10. The court further held that the parties' course of negotiations provided sufficient evidence to find that the parties had agreed to a reasonable, or market, price for the business. ***Id***., ¶15.

¶19 Here, the parties entered into a lease agreement which contained an option to renew for a two-year period. D & D claims to have been notified at the close of the 2005-2006 lease period that Steffen Brother's would not be entering into a new lease. Unlike the parties' conduct in ***Herder Hallmark***, Steffen

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[2] We note that in 1969 the legislature enacted WIS. STAT. § 704.03. 1969 Wis. Act 284, § 25 (cmt.). Section 704.03 sets forth the requirements of writing for rental agreements and terminations, providing that a lease for more than a year is not enforceable unless it meets the requirements of § 706.02 and in addition sets forth a number of terms, including rent. While the parties did not address § 704.03 in their pleadings or motions, it further reinforces the essential terms requirements set forth in ***Ratcliff v. Aspros***, 254 Wis. 126, 35 N.W.2d 217 (1948), ***Leider v. Schmidt***, 260 Wis. 273, 50 N.W.2d 233 (1951), and ***Batavian National Bank v. S & H, Inc.***, 3 Wis. 2d 565, 89 N.W.2d 309 (1958).

Brother's conduct subsequent to this notification did not evidence an intent to enter into a new lease. To the contrary, D & D and Steffen Brother's did not continue their arrangement into a new lease period. Furthermore, the parties' negotiations in ***Herder Hallmark*** provided the court with evidence that the parties' intended to agree upon a reasonable, or market, price. ***Id***. Here, however, the parties provided no method, procedure or guideline governing how the parties intended to reach an agreement as to lease price.[3] The law governing lease renewal provisions prohibits the courts from supplying those missing terms in the absence of any standard or method for determining the rental price. ***Batavian***, 3 Wis. 2d at 569.

¶20 It is undisputed that the lease renewal provision incorporated into the 2004 Land Lease Extension failed to provide a rental price or any procedure or method for determining a rental price, providing only that "[t]he price of the additional 2 year lease shall be negotiated at the time of the new lease." Moreover, while there is a long history of the parties reaching an agreement on rent for the land, there is no indication as to how these agreements were reached or what methods or guidelines the parties would use in the future. Wisconsin law governing lease renewal provisions is clear that the absence of this essential term renders the renewal clause unenforceable.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[3] While the parties do not directly address the issue, we note that the renewal option does not address the terms of the lease other than the duration of two years. The leases over the years did not contain the same terms and conditions, and as such, it is apparent that the terms were also negotiated with several of the lease renewals.