

Case Law Update: A Refresher on Unenforceable Agreements to Agree

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Practice Area: Retail Real Estate

"Rent during the option period shall be fair market value rent as determined by the parties."

"Rent during the extension term shall be agreed upon by the parties based upon the then current fair market rent for similarly situated properties in the same general geographic area."

Have you ever seen this language in a letter of intent? Has this language or some variation thereof been used in a lease document?

Contracts must be definite and certain as to their basic terms to be enforceable. General contract law provides that when a term is indefinite, the contract will be void unless the parties provide a practicable method for determining the indefinite term. The law regarding contractual agreements is such that a contract is not formed if the parties contemplate that something remains to be done to establish the contract or if elements are left for future arrangement. When an agreement states that certain terms shall be settled later by the parties, those terms do not become binding unless and until they are settled by a later agreement.

While the case of *Gibbons Ranches, L.L.C. v. Bailey* involved farm leases, this recent Nebraska Supreme Court case is a good reminder of the application of these general contract principles in lease situations. The leases involved in the Nebraska case required "[a]n annual review of rental rates and terms in January of each year." In January of 2012, a rent review took place and the rent was adjusted by agreement of the parties. However, the following year, the parties failed to reach an agreement to change the rent and the tenants submitted checks based on the prior year's rental rates, which the landlord disputed.

The Nebraska Supreme Court held in part that "when an express lease agreement contemplates the payment of rent in money, the amount of rent is an essential term of the agreement" and an agreement to agree on rent in the future is not enforceable.

Based on general contract principles and seen in the recent Nebraska case, agreements to agree on the amount of future rent should be avoided. Landlords and tenants should agree upon a method for later determining the amount of rent to be paid. While it is understandable that the parties may not want to commit to a specific dollar amount in the future, a definition, and more importantly, a process for determining fair market rent should be established. If the parties are unable to agree on an amount in the future, potential processes for establishing rent could include the hiring of one or more experts in the area to establish fair market rent for the premises.

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