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*“the extension option ... did not clearly or unequivocally establish that the parties intended to give the tenant multiple extensions.”*

**Perpetual Lease Options****THIS ISSUE**

When does a lease grant a tenant the perpetual right to renew? The California Court of Appeal recently dealt with that issue in *Ginsberg v. Gamson*. It is a cautionary tale for those drafting leases, especially commercial leases, where the misplacement of a few words can lead to unintended results.

**BACKGROUND**

Commercial leases are often drafted by lawyers who specialize in that field. Common concepts become well-drafted over time, and their language, having been scrutinized by the courts of appeal, becomes more or less standardized. When a lawyer drafts a lease option, the language is usually pretty clear, if for no other reason than it has a commonly accepted meaning among attorneys.

But when non-lawyers draft their own leases, they often use language that is untested by the courts. While to a layperson the language may sound better, it can be ambiguous or just plain wrong. And when they use pre-printed form leases, or draft their own addenda to existing leases, or combine multiple pre-printed lease terms without regard for the legal impact of how they work together, the problems multiply.

Even in the smallest commercial leases, ambiguity can be devastating, as the landlord and tenant found out in *Ginsberg v. Gamson*. There, the tenant believed it was entering into a retail lease with options to renew in perpetuity, while the landlord believed that the lease was limited to a single 5-year option.

The lease language itself was anything but clear. Indeed, if the drafters had used the words “in perpetuity” then lawyers and judges would have known what to do with it. But, alas, they did not.

The lease addendum stated: "Provided that Tenant shall not then be in default hereunder, Tenant shall have the option to extend the Term of this Lease for 5 (FIVE) YEARS additional FIVE year periods upon the same terms and conditions herein contained... ."

California law prohibits any lease in excess of 99 years.<sup>1</sup> Given the lease ambiguity, the tenant argued that it should be interpreted to give perpetual 5-year options for the entire 99-year period.

The landlord argued the contrary, that it gave the tenant no options at all, since it would violate the 99-year rule against creating a "perpetuity" in leases. The intent of the 99-year lease limitation is to prevent someone alive now from dictating how the property will be used forever. Thus, if the lease had said that there were options "in perpetuity" it is very likely the court would simply have thrown out that term, or perhaps even the entire lease, as void against Civil Code § 718.

The parties went to trial, first in front of a judge and for the second half of the trial, in front of a jury. The trial judge concluded the lease granted the tenant the right to unlimited five-year extensions for 99 years. The jury, being so instructed, found the landlord in breach and awarded compensatory damages of \$49,000 to the tenant.

The landlord appealed the trial court's ruling regarding the unlimited lease options.

## APPELLATE RULING

### *No unlimited options except when expressly stated in the lease*

Surprisingly, the California Supreme Court has not rendered an opinion on this issue in over 150 years. In *Morrison v. Rossignol* (1855), the California Supreme Court concluded a covenant allowing a lease to be renewed indefinitely at the lessee's option is "in effect, the creation of a perpetuity; it

puts it in the power of one party to renew forever, and is therefore against the policy of the law."

Despite being disfavored, a California lease provision that grants a tenant the right to unlimited renewals, may be enforced by some (non-California) courts so long as the parties' intent to create that right is explicit and clear. Nevertheless, the general rule is that: "while not within the purview of the rule against perpetuities, leases which may have been intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal."

To interpret the lease at issue, the court in *Ginsberg v. Gamson* looked to an earlier case that dealt with the same issue. The language of that older case is, by today's standards, anything but clear, despite the court's statement that the language was "so plain that no room is left for construction. The parties have made it clear that it was their intention that the lessee should have the right of renewal in perpetuity."

That "clear" renewal provision stated: " 'To have and to hold the same period unto the party of the second part, his heirs and assigns for the term and period of ten years from date hereof with the right of renewal for a further term of ten years at the end of such term, or at the end of any subsequent term for which it may be renewed.' "

Presumably, the most clear language was "or at the end of any subsequent term for which it may be renewed." This phrase indicated the right to renew would be included in each renewed lease, without limit. In addition, the provision specifically referenced the lessee's heirs and assigns, suggesting the possibility of a long-term arrangement that would outlast the original lessee.

<sup>1</sup> Civil Code §718

In contrast, the language of the extension option that the *Ginsberg* court was considering did not clearly or unequivocally establish that the parties intended to give the tenant multiple extensions. The addendum's "option to extend term" did not state the tenant would have the option to extend the term for additional five-year periods in perpetuity, forever, or for all time, except as limited by statute.

And so there it is, the magic language that lawyers should include in a lease if they intend to create options to renew the lease for the full period of 99 years: "the tenant shall have the option to extend the term for additional five-year periods in perpetuity, [or forever, or for all time] except as limited by statute."

In *Ginsberg*, there were other indicia that the lease was not intended to last forever. For example, the tenant was restricted to using the premises for one specific retail purpose unless the landlord consented to other uses. The lease required the landlord to maintain significant responsibility for the leased property, including the obligation to make repairs, pay property taxes, and pay for water and garbage services. The lease forbade the tenant from making any alterations over \$1,000 without the landlord's consent, and required that the property be returned in "good condition," excepting ordinary wear and tear. All of these, the court held, pointed to the intent of the parties that the lease would be for a shorter period of time than the full 99 years allowed under Civil Code § 718.

Also the parties used a preprinted "form" lease. Although the main body of the lease included a provision stating the lease would be binding on the parties' heirs, successors, and assigns, the extension option in the separately drafted addendum did not repeat this language. The lease also prohibited the tenant from assigning the lease or subletting without the landlord's consent.

## SUMMARY OF THE LAW

California leases may not go on forever. And though there are other jurisdictions that may enforce perpetual lease terms, the language in the lease must be absolutely unequivocal that the parties intended a lease in perpetuity.

If a California lease option is written ambiguously, the Courts usually will not try to supply evidence of the terms or the intent of the parties to determine what was really meant. The court will most often simply strike the options altogether, leaving the tenant with no renewal options.

## CONCLUSION

The law is constantly evolving, with new cases decided every single day. And it is filled with cautionary tales, where the unwilling participants in the process of forming new California law are dragged for years through the court system merely because they failed to take basic precautionary measures to ensure their safety.

If you are considering entering into a lease, you would be well advised to have an attorney draft it. The failure to do so may result in small changes, seemingly inconsequential at the time, that have enormous impact on the rights of the parties. And right or wrong, if the terms in the lease are new and untested before the courts, they may well become the stuff of new law, and cautionary advice to others.

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