

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

ZEECK V. STARMAN

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

ALLEN ZEECK, DOING BUSINESS AS MOJO'S COFFEE HOUSE, APPELLANT,  
V.  
STEVEN STARMAN, INDIVIDUALLY, ET AL., APPELLEES.

Filed September 4, 2012. No. A-11-1056.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge.  
Affirmed.

Patrick McCormick for appellant.

David L. Buelt, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., and Robert E.  
O'Connor, Jr., for appellees.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

**INTRODUCTION**

Allen Zeeck filed an action against Steven Starman and Mark Samuelson for breach of contract and violation of the covenant of good faith and fair dealing in connection with the alleged renewal of a lease between the parties. Zeeck also filed an action against CVS Pharmacy (CVS) for tortious interference. The Douglas County District Court entered summary judgment in Starman's, Samuelson's, and CVS' favor. Because Zeeck has failed to show a genuine issue of material fact concerning the alleged extension of the lease between the parties, we affirm.

**BACKGROUND**

On June 5, 2008, Starman and Samuelson, as lessors, and Zeeck, as lessee, entered into a written commercial lease agreement. The lease commenced on May 1, 2008, and the initial term was set to expire on April 30, 2009. The lease agreement included an "Option to Renew" that stated:

Provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to renew the lease for an additional term of two (2) years commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be determined [by] the parties. The option shall be exercised by written notice given to Lessor not less than thirty (30) days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

Zeeck operated Mojo's Coffee House in the space until sometime in 2009, when he closed the business to allegedly remodel the premises and reopen as a coffee shop and baked potato restaurant. No written option to renew the lease was given by Zeeck. Zeeck did not vacate the premises upon expiration of the written lease, but continued to occupy the premises and make some payments to the lessor. In December, Zeeck was advised that the premises were being sold to CVS. At some point, Zeeck vacated the premises and stopped making rental payments.

On February 9, 2011, Zeeck filed a complaint against Starman and Samuelson, seeking damages for breach of contract and violation of the implied covenant of good faith and fair dealing. Zeeck also named CVS in his complaint, alleging that it tortiously interfered with his business contract.

In his verified complaint, Zeeck alleges that the term of the lease was for 1 year and that it was renewed for 1 year on May 1, 2009. Zeeck alleged that in April 2009, he spoke with Samuelson about his intention to remodel the premises and reopen as a coffee shop and baked potato restaurant and that Zeeck closed the coffee house in May 2009 in order to do the remodeling. Zeeck alleged that he spoke monthly with Samuelson and frequently with Samuelson's wife about the remodeling and projected reopening of the premises. He alleged that he placed posters in the windows of the premises announcing the coming of the new restaurant and that an article was published in the local newspaper announcing the closing of the coffee house and projected reopening as a coffee shop and baked potato restaurant. Zeeck also alleged that in November 2009, Zeeck told Samuelson that another individual agreed to buy the business for \$28,000. Zeeck stated that he paid the monthly rents required under the lease, utilities and insurance on the property, and expenses associated with remodeling and security. Zeeck alleged that in December 2009, Samuelson announced to Zeeck that the owners of the leased premises were selling the premises to CVS, that rental payments would no longer be required, but that at this point, it was not clear when Zeeck needed to have personal property removed. Zeeck alleged that the lessors breached the covenant of good faith and fair dealing by accepting rental payments and encouraging Zeeck to stay in the leased premises and develop the coffee shop and baked potato restaurant. Zeeck alleged that he was damaged in the amount of \$28,000 for the loss of the sale of the business, together with the rents paid from May to December 2009, as well as the costs for the utilities, security, insurance, and renovation, in an amount to be determined at trial. In their answer, Starman and Samuelson deny that the lease was renewed on May 1 and allege that it expired on April 30. They further deny that the alleged conversations between Zeeck and Samuelson occurred except that Zeeck had indicated that his business operations were closing and he would keep his property on the premises on a month-to-month basis. Starman and Samuelson allege that Zeeck held over after his lease expired under a month-to-month tenancy, that his business never reopened, and that he kept his personal property on the premises. They

allege that Zeeck was to pay a monthly rent until he vacated, which he failed to do. Starman and Samuelson understood that Zeeck's efforts to sell his business to a third party had been fruitless and were terminated before Starman and Samuelson entered into the contract to sell the building to CVS. Starman and Samuelson alleged that they gave Zeeck notice of the agreement to sell the building which contained the leased space and advised him that he would need to vacate and seasonably remove his personal property. Finally, they alleged that Zeeck made no claim or complaint about the termination of his month-to-month tenancy and removed his remaining personal property without claim of any continuing lease obligation. The answer also contained the affirmative defenses of failure to state a claim, estoppel, waiver, and failure to mitigate damages.

Starman, Samuelson, and CVS filed a motion for summary judgment on September 19, 2009. At the hearing, the movants offered, and the district court received, Samuelson's affidavit and Zeeck's answers to requests for admissions. No additional evidence was offered by Zeeck.

Samuelson's affidavit attached a copy of the lease. Samuelson stated that he dealt with Zeeck in connection with the lease, that Zeeck never exercised by written notice prior to the expiration of the initial lease term a desire to exercise his 2-year option, and that there is no writing between Zeeck, Starman, and Samuelson evidencing any written lease agreement after April 30, 2009, the expiration of the lease. Samuelson further stated that by March 2009, the coffee house operated by Zeeck had closed, that there was no certificate of occupancy for the building, that utilities were not being paid, and that there was no health department certificate on the property, having expired December 31, 2008. Samuelson stated that Zeeck did not terminate his tenancy after the lease expired and told Samuelson that he was in the process of obtaining a new tenant for the building for a new business. Samuelson met with this person, but the attempt to create a new business never materialized. Samuelson stated that Zeeck did not execute a new lease, that Zeeck did not pay rent regularly, and that no remodeling was ever undertaken. Samuelson stated that Zeeck would make payments from time to time for the right to continue to store his personal property at the business location.

In his requests for admission, Zeeck admitted that the written lease is the only writing between the parties and that no written notice of intent to exercise the option to renew was given. However, Zeeck denied that the lease expired on April 30, 2009, but, rather, alleged that a discussion occurred between Zeeck and Samuelson prior to April 30 wherein Zeeck notified Samuelson of his intention to remodel the premises and Samuelson told Zeeck that a written notice to renew was not necessary, thereby orally modifying the written notice term. Zeeck denied that he did not make all the monthly rental payments after May 2009, but alleged that all terms of the lease were abided by, including the rental requirements provided in the lease, until December 2009 when Samuelson notified Zeeck of the sale of the building and that Zeeck was no longer required to pay any rent. Zeeck admitted that he removed all items of personal property from the premises.

On November 4, 2011, the district court granted the motion for summary judgment, finding no genuine issues of material fact, and dismissed Zeeck's complaint.

## ASSIGNMENTS OF ERROR

Zeeck asserts the trial court erred in sustaining the motion for summary judgment. In his brief, Zeeck argues error only in connection with the summary judgment entered in favor of Starman and Samuelson and does not argue any error with respect to the summary judgment entered on behalf of CVS. Therefore, we limit our analysis only to the summary judgment entered in favor of Starman and Samuelson. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

## STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence. *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

## ANALYSIS

At issue in this appeal is whether the district court erred in entering summary judgment in favor of Starman and Samuelson and against Zeeck. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate the movant is entitled to judgment if the evidence was uncontroverted at trial, 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. *Id.*

There is no dispute that Zeeck did not provide written notice of his intent to renew the lease. The general rule is that acceptance of an option to extend a lease must be strictly construed in accordance with the terms of the option. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). Under a provision specifically designating the time within which notice to extend a lease must be given, that time is of the essence, and such provision is to be strictly construed. *Id.* A lessee has no right to the renewal term unless the option is exercised in a timely manner in strict accordance with the specifications of the lease agreement. *Id.*

Zeeck did not give written notice to extend the lease within the time given in compliance with the lease. However, Zeeck argues that there was an oral modification to this written term by virtue of a conversation with Samuelson in which Samuelson indicated that written notice was not necessary. Starman and Samuelson deny that any conversation took place which orally modified the contract and argue that the 1-year lease terminated on April 30, 2009, after which Zeeck had a month-to-month tenancy. Zeeck argues that this dispute in the evidence creates a genuine issue of material fact regarding whether Starman and Samuelson waived the requirement

of written notice of renewal and modified the notice provision, thereby preventing the entry of summary judgment. See *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961) (tenant gave written notice of renewal too late but summary judgment in favor of lessors reversed because question of fact whether oral notice timely given based upon conversations between parties).

Even if a genuine issue of material fact exists concerning the waiver of the written renewal notice or modification of the notice provision, we find that entry of summary judgment was still proper for the reason that there was not a binding agreement for a lease renewal. The lease provided that upon exercise of the option to renew the lease for an additional term of 2 years, all of the terms and conditions of the lease shall apply during the renewal term “except that the monthly rent shall be determined by the parties.” Zeeck alleged in his complaint that the lease renewed for 1 year, which is contrary to the terms of the lease option. More important, Zeeck did not allege that the parties agreed to an amount for monthly rent. Rather, he merely alleged that he made rental payments from May through December 2009. Samuelson presented evidence that Zeeck made some payments after May for the right to store his personal property at the premises, but that he did not pay rent regularly. Samuelson presented evidence that there was no writing between the parties or any written lease agreement after April 30, the expiration of the initial lease, and Zeeck admits this to be true. Although Zeeck alleged an oral modification of the renewal notice provision, Zeeck failed to present evidence of an oral agreement for the lease of the premises for any specified term or that the parties agreed to an essential term of the alleged lease extension; namely, the monthly rent to be paid by Zeeck. In sum, there is no genuine issue of material fact which supports a finding that the parties entered into an agreement for a lease extension.

““An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. When 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.””

*Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 754, 626 N.W.2d 472, 500 (2001), quoting *Alward v. United Mineral Products Co.*, 197 Neb. 658, 250 N.W.2d 623 (1977) (emphasis omitted). See, also, *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 351 N.W.2d 414 (1984). The law does not compel a duty to perform that which one has not contractually agreed to do, either expressly or impliedly. *R.A.S., Inc. v. Crowley, supra*. As no binding agreement for a lease extension existed between the parties, the district court did not err in entering summary judgment in favor of Starman and Samuelson.

#### CONCLUSION

Because there is no dispute as to a material fact concerning any agreement for the lease renewal, we affirm the district court’s entry of summary judgment in favor of the appellees.

AFFIRMED.