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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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BISHOP, J. dissenting. I believe that the trial court should not have granted summary judgment because the pleadings and affidavits submitted by the defendant in opposition to the motion for summary judgment fairly implicated the central question of whether the lease had terminated.

The trial court relied on the proposition, gleaned from Connecticut decisional law, that, where the language of the lease is clear and definite, the intention of the parties must be gathered from the instrument itself, and that, where contractual language is clear and unambiguous, intent is a question of law that may be decided by way of summary judgment. *Water & Way Properties* v. *Colt's Mfg. Co.*, 230 Conn. 660, 666–68, 646 A.2d 143 (1994) (phrase ''additional rent'' plain, unambiguous); *Collins* v. *Sears, Roebuck & Co.*, 164 Conn. 369, 373–74, 321 A.2d 444 (1973) (provision for increased rent if property foreclosed on found unambiguous). While I agree that these propositions apply in many cases involving contractual interpretation, I believe these truths are, here, inapplicable. Our courts have consistently held that even though a lease speaks in terms of a ''right to renew,'' that language, itself, is not conclusive. Therefore, to the extent that the court found that the language of the lease alone was adequate to determine the intent of the parties as a matter of law, I believe it improperly grafted general contract law[1] into a particular context in which decisional law has carved out an exception.

I agree with the majority that the determinative issue is whether the option in the lease is one to extend or to renew, and also agree that the resolution of that issue requires a determination of the parties' intent. I part company with my colleagues because I believe that intent is a genuine question of material fact that, when adequately raised, defeats summary judgment.

A review of our decisional law suggests that the specific contractual language ''option to renew'' is frequently not indicative of the nature of the option, and, in such cases where it is contended that the lease option is for an extension and not a renewal,[2] further inquiry is warranted to determine the intent of the parties. The distinction between an extension and a renewal of a lease is a technical one; *Johnson* v. *Mary Oliver Candy Shops, Inc.*, 116 Conn. 86, 89, 163 A. 606 (1933); and one that is ignored in a substantial number of jurisdictions,[3] yet persists, vestigially, in Connecticut. The most pertinent aspect of the distinction is that an extension is considered a continuation of the existing lease, not requiring a new lease, while a renewal, in the most technical sense, is a new demise, requiring a new lease.[4]

The trial court's decision and the majority's affirmance turn on the characterization of the lease language as an option to renew. If the option is for a renewal, then, as our case law generally holds, the exercise of the option results in no possessory right in the leasehold without a new written lease—though it may entitle the lessee to other legal rights. If the option is determined to be an extension, then the exercise of the option provides a possessory right, as the extended term is viewed as a continuance of the original lease. In other words, if the lease option is a covenant to extend the lease, and not to renew it, then the summary process action under General Statutes § 47a-26d is inapplicable because the defendants, if they have properly exercised the option to extend the lease,[5] can show title.[6] Therefore, to defeat the plaintiff's motion for summary judgment in the present action, it should have been sufficient for the defendant to raise the factual question of whether the option operates as an extension or as a renewal. I believe the defendant met this burden by the pleadings and the materials it submitted in opposition to the motion.

A brief review of our decisional law supports the notion that the option language can be understood as providing for an extension, rather than a renewal, by reference to the conduct of the parties and a review of the entire lease. In short, the language of the clause itself, no matter how apparently clear, is, alone, often not determinative.

In *Ackerman* v. *Loforese*, 111 Conn. 700, 151 A. 159 (1930), a tenant attempted to renew pursuant to a renewal clause, but did not succeed in obtaining a new lease. When the landlord later claimed that the tenant had failed in his attempt to renew, the court turned to the distinction between a renewal and an extension. ''A technical difference is frequently recognized . . . between the effect of a covenant for renewal and one for extension, especially as to the effect of retention of possession after the original term, it being held that a stipulation for renewal does not, like a covenant to extend, of itself and alone continue the tenancy for the renewal period, but calls for a new lease, a formal extension of the existing lease or something equivalent thereto . . . . [I]t is recognized that the technical difference may be controlled by the intention of the parties as manifested by the entire lease or by their practical construction of their contract, as by conduct before the controversy arose, whereby the privilege may be construed as one for an extension of term, though the language employed, in a strict technical sense, may signify renewal. The mere fact that the privilege is called one to renew is not conclusive.'' (Citations omitted.) Id., 704.

These two tenets—that the terminology of renewal does not necessarily mean that a renewal was intended

and that the intention of the parties may govern the characterization—have been reiterated frequently in landlord-tenant cases since *Ackerman*. In *Blanck* v. *Kimland Realty Co.*, 122 Conn. 317, 189 A. 176 (1937), which quoted *W.G. Maltby, Inc.* v. *Associated Realty Co.*, 114 Conn. 283, 285 n.(a) & 288–89, 158 A. 548 (1932), our Supreme Court held that ''an agreement . . . for a lease . . . with privilege of renewing lease for five years, [was] one for an extension and not a covenant of renewal . . . . There is *no express covenant* on the part of the lessor to enter into a new lease, and we think the agreement in this case is to be construed as one for an extension rather than a covenant of renewal in the strict sense. This is controlling authority for our conclusion that in the present case the agreement was for an extension of the lease and not a covenant of renewal.'' (Emphasis added; internal quotation marks omitted.) *Blanck* v. *Kimland Realty Co.*, supra, 320.

Twelve years later, in *Didriksen* v. *Havens*, 136 Conn. 41, 68 A.2d 163 (1949), our Supreme Court, in affirming the trial court, concluded that the phrase '' 'the privilege of renewing this lease' ''; id., 42; actually gave the lessee the privilege of extending the lease. Id., 45. In doing so, the court looked to letters exchanged by the lessor and lessee (which continued to use the word ''renew''), the parties' actions, as well as the lessee's improvements to the property. Id., 44–45. ''If there is any doubt that extensions rather than renewals were intended, it is removed by the practical construction of the parties in continuing the lease merely upon the strength of the letters passing between them.'' Id., 45.

More recently, in *Seven Fifty Main Street Associates Ltd. Partnership* v. *Spector*, 5 Conn. App. 170, 171, 497 A.2d 96, cert. dismissed, 197 Conn. 815, 499 A.2d 804 (1985), the court commented that ''[a]lthough . . . the lease speaks in terms of a 'right to renew,' such language, in and of itself, is not conclusive [of the parties' intent].'' The holdover lessee, who had not acted in any affirmative way to renew the lease, claimed that the option was really one to extend, which would be exercised by holding over. The court reviewed the holdover clause to ascertain the intent of the parties in the event that the lessees remained on the premises after the expiration of the lease.[7] Upon finding that the holdover clause foreclosed the possibility that remaining after the lease's first term would operate to either extend or renew (the factual distinction, at this point, became immaterial), this court found that the trial court did not improperly find that the option was one to renew.[8]

As this cursory review of our decisional law shows, the language of the lease does not control when determining whether an option is one to renew or to extend, but the intent of the parties controls, as evidenced by any number of collateral factors, including the actions or expressed beliefs of the parties, the

nature of the business at the leasehold, the parties' statements and deeds, and past practice: In other words, "*the intention of the parties as manifested by the entire lease or by their practical construction of their contract, as by conduct before the controversy arose* . . . ." (Emphasis added.) *Ackerman* v. *Loforese*, supra, 111 Conn. 704. This determination requires an examination of the intent of the parties, and, since intent is a question of fact; *Peter-Michael, Inc.* v. *Sea Shell Associates*, 244 Conn. 269, 275, 709 A.2d 558 (1998); requiring fact based analysis, summary judgment should not have been granted.

In finding that there was no genuine issue of material fact as to title, the trial court looked to the construction of the renewal clause, and, to a lesser extent, the holdover clause to determine whether the parties intended that a new written lease would be required for the defendant to remain in possession. The majority goes further and additionally examines the lease amendment to support the trial court's finding that the parties intended to renew. In either case, I believe, respectfully, the court is engaging in fact-finding, an improper foray when testing a motion for summary judgment or a trial court's response to it. For me, the inquiry stops at the determination that a question of material fact, in this case the intent of the parties, has been raised.

In examining the entire lease, and the practical construction of it by the parties prior to this controversy, as our case law requires, I think it is material that the first renewal, for five years after the initial ten year term, was exercised *without a new lease*, but merely with an amendment to the original lease. The amendment, dated two days after the expiration of the first term, memorializes the parties' agreement to the renewal, specifies terms for the new rental period[9] and refers back to the original lease for all other terms.[10] The sole condition precedent mentioned in conjunction with the option to renew, both in the original document and the amendment, was for timely notice. Under these circumstances, it is not unreasonable to conclude that a fact finder could determine that the parties contemplated a lease extension, notwithstanding the language of the option clause.

Additionally, the option here contains no express requirement for a new lease, nor did the parties create a new lease when the option for the first term was exercised. These facts alone, if construed in favor of the nonmoving party, raise a question of material fact as to the intent of the parties that is sufficient to defeat summary judgment. Also, the affidavit from the defendant's president attests the following: "[A]ll the parties to the transaction knew that I would only purchase the restaurant if I could have a twenty year lease. . . . [I]t was always my intent and the intent of the parties to permit [the defendant] to have a twenty year lease. . . .

[I]t was absolutely imperative to have a twenty year lease in order to make the financial commitment necessary to run this business.'' Further, the defendant in that affidavit purports to ''have expended large sums of money, in addition to my lease payments, to effectuate any and all repairs and 'cosmetic renovations' that were or may have been required under the lease.''

To the extent that the court made factual findings that led it to the conclusion that the lease was clear and unambiguous, the court exceeded its bounds. It is axiomatic that in considering a motion for summary judgment, the function of the court is to determine whether any genuine issue of material fact is in dispute, not to make factual findings. *Golden* v. *Johnson Memorial Hospital, Inc.*, 66 Conn. App. 518, 522, 785 A.2d 234, cert. denied, 259 Conn. 902, 789 A.2d 990 (2001); *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 35 Conn. App. 94, 102, 644 A.2d 933 (1994). The court found that ''it is undisputed that . . . the old lease expired and a new lease was never implemented.'' While the defendant was, concededly, unclear in its assertion that the option was one to extend and not simply one to renew (''the technical distinction''), it has consistently denied that the lease had expired by lapse of time, and has asserted that the intent behind the two lease options was to have the equivalent of a twenty year lease. Implicit in these assertions is the belief that the option was, what has been historically called, an extension. Since, in Connecticut, we maintain a distinction between covenants to renew and covenants to extend, and hold that the language of such covenants is equivocal in itself, I believe we are obliged to look beyond the immediate language of the option, to factually determine the intent of the parties.

Accordingly, for the reasons stated, I respectfully dissent.

[1] ''[B]ecause the trial court relied solely upon the written [agreements] in ascertaining the intent of the parties, the legal inferences properly to be drawn from the [documents are questions] of law . . . . *Morton Buildings, Inc.* v. *Bannon*, [222 Conn. 49], 53–54, [607 A.2d 424 (1992)]. See, e.g., *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 62, 591 A.2d 1231 (1991) (legal effect of [undisputed] facts is question of law); *Bria* v. *St. Joseph's Hospital*, 153 Conn. 626, 632, 220 A.2d 29 (1966) (when surrounding circumstances are not in dispute, construction and legal effect of [contract] is question of law). . . . . Accordingly, our standard of review is plenary.'' (Citation omitted; internal quotation marks omitted.) *Issler* v. *Issler*, 250 Conn. 226, 236, 737 A.2d 383 (1999).

[2] The defendant argues in its appellate brief that ''an extension does not require a new document if, in the existing lease, at least three of the limitations for a valid lease are certain: the commencement, the continuance, and the end of the term. . . . Accordingly, no new document was required because the three limitations for a valid lease all were contained within the existing lease.'' (Internal quotation marks omitted.) Further, in its answer to the complaint, the defendant denies that the lease has terminated by lapse of time.

[3] R. Schoshinski, American Law of Landlord and Tenant (1980) § 9:1, pp. 595–97. ''[I]n a substantial group of jurisdictions, courts quite sensibly refuse to draw any distinction between an option to renew and one to extend since such differentiation is not made by laymen entering into lease arrangements.'' Id., 597.

''It has been recognized that in many respects the words 'extension' and

'renewal' are of similar import and that they are frequently used as being synonymous; and it has been said that the tendency of courts seems to be to disregard any distinction between them. Some authorities have gone further and declared that there is no distinction or substantial difference between the terms. It has been asserted that the words 'renewal' and 'extension' as used in a lease are not always to be considered words of art, that they have no legal or technical significance, and that they may mean whatever the parties intended when contracting.

"Even in jurisdictions in which a distinction obtains, it has been judicially recognized that considerable difficulty sometimes arises in deciding whether in different leases a provision is one for a renewal or an extension. In the final analysis, whether a contractual provision involves a renewal or an extension is determined by the intention of the parties as disclosed by the whole instrument and the parties' interpretation and practical construction thereof; and the use of the word 'renewal' or 'extension' is not conclusive." 51C C.J.S. 165–66, Landlord and Tenant § 54 (b) (1968).

[4] R. Schoshinski, American Law of Landlord and Tenant (1980) § 9:1, p. 596. "Some courts have drawn this sharp distinction between renewal and extension, requiring more than mere holding over and payment of rent to exercise an option to renew. Under the most narrow view, since renewal is a new tenancy, the execution of a new leasing agreement is required to give it effect." Id.

[5] I am mindful that the option, even if construed as an option to extend, leaves the monthly rental of the extended period open to negotiation. That concern, however, is not determinative of the issue because the inclusion of a fixed rate for the option period may not be an essential component of an option to extend. See *Corthouts* v. *Connecticut Fire Safety Services Corp.*, 2 Conn. Cir. Ct. 34, 38–39, 193 A.2d 909 (1963) (extension does not require new document if, in existing lease, at least three of limitations for valid lease are certain: commencement, continuance, end of term); see also *Santopietro* v. *Dugan's Restaurant Cafe*, Superior Court, judicial district of Waterbury, Housing Session, Docket No. 015786 (March 20, 1996); *Larsen* v. *Timothy's Ice Cream*, Superior Court, judicial district of Fairfield, Housing Session, Docket No. 29502 (October 12, 1995).

The question of whether an option to extend or renew, where the rent to be paid is "to be negotiated," is unenforceable for vagueness is a question of first impression for appellate review in Connecticut. Other jurisdictions have split on the issue, some finding that the absence of a rental amount or a formula for determining it makes the option unenforceable; see 58 A.L.R.3d 500 (1974); but a growing number of jurisdictions have found that a "reasonable" amount of monthly rent is to be implied and could be determined by a court to be fair market rental. See *Fletcher* v. *Frisbee*, 119 N.H. 555, 560, 404 A.2d 1106 (1979); *Playmate Club, Inc.* v. *Country Clubs, Inc.*, 62 Tenn. App. 383, 462 S.W.2d 890 (1970). This latter view has been characterized as the "trend in modern decisions" by at least one commentator. R. Schoshinski, American Law of Landlord and Tenant (1980) § 9:6, p. 614.

[6] General Statutes § 47a-26d provides in relevant part: "If, on the trial of a summary process complaint it is found that the defendant is the lessee . . . and holds over after the termination of the lease . . . or, if there was no lease . . . and the defendant does not show title in himself . . . the court shall forthwith enter judgment that the complainant recover possession . . . ."

[7] The holdover clause in *Seven Fifty Main Street Associates Ltd. Partnership* provided that if the lessee remained after the term of the lease without "having executed a *new written lease* . . . such holding over shall not constitute a *renewal or extension* of this lease." (Emphasis added; internal quotation marks omitted.) *Seven Fifty Main Street Associates Ltd. Partnership* v. *Spector*, supra, 5 Conn. App. 172. In contrast, in this case, the clause makes no mention of the effect holding over would have as to the exercise of an extension, nor does it mention a new written lease.

At common law, an extension can be exercised by mere holding over. Whether an extension can be exercised in such a way is only peripheral to this case, however, because, the lease provides another specific means of exercising the option, that is, by giving timely notice, which the lessee, arguably, gave. It is argued that the giving of proper notice combined with the terms of the option specified in the lease was sufficient to exercise the option to extend the lease. In essence, the lessee claims that it is not holding over. See footnote 6.

[8] For a sample of recent jurisprudence on this subject, see also *Warner*

*Associates* v. *Logan*, 50 Conn. App. 90, 718 A.2d 48 (1998); *David A. Altschuler Trust* v. *Blanchette*, 33 Conn. App. 570, 636 A.2d 1381, cert. denied, 229 Conn. 906, 640 A.2d 117 (1994); *Tehrani* v. *Century Medical Center, P.C.*, 7 Conn. App. 301, 508 A.2d 814 (1986); *Zuckerman Group* v. *Raveis*, 4 Conn. App. 568, 495 A.2d 300, cert. dismissed, 197 Conn. 811, 499 A.2d 62 (1985).

[9] The option to renew states that all the same terms and conditions apply to the renewal period, "except that annual rental for said additional terms is to be negotiated by the parties . . . ." The enforceability of this option is contested by the plaintiff because it leaves open to question the amount of rent to be paid in the future. The trial court did not find it necessary to reach this question. See footnote 5.

[10] The amendment states in relevant part: "4. Except as expressly modified and amended pursuant to the terms of this Amendment, all other covenants and agreements provided for in the Lease shall remain in full force and effect and continue to govern the parties."