

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KAUSHIK DATTANI, as Trustee, etc.,

Plaintiff, Cross-defendant and  
Respondent,

v.

MICHAEL JENNINGS et al.,

Defendants, Cross-complainants and  
Appellants.

A143642

(San Francisco City & County  
Super. Ct. No. CGC 13-533495)

Michael and Elaine Jennings and their business, Small Potatoes Catering and Events Inc. (collectively defendants), agreed to lease a commercial property from plaintiff Kaushik Dattani, as trustee for the M. Dattani Credit Trust, for a period of five years. Pursuant to the parties' agreement, defendants had the option to extend the lease for an additional five years. For the option period, the rent would be set at the "market rate," which was to be established by plaintiff upon obtaining a written confirmation from a reputable leasing agent. After defendants confirmed they would exercise the option, the parties could not agree on a rental amount. Defendants vacated the premises, and plaintiff sued for breach of contract. Following a bench trial, plaintiff was awarded \$61,330.64 in damages, as well as attorney fees and costs in the amount of \$21,911.09.

Defendants now appeal, arguing (1) they were not obligated to continue leasing the premises because there was no agreement on rent; (2) the option is unenforceable because it did not contain an ascertainable standard for determining rent; (3) defendants'

performance was excused because plaintiff breached the contract; (4) plaintiff failed to mitigate damages; (5) the trial court erred in including plaintiff's broker's fees in the damage award; and (6) the attorney fee award should be vacated. We find these arguments unavailing and affirm.

## **I. BACKGROUND<sup>1</sup>**

In May 2008, the parties entered into a "Restaurant Lease" for a 2,000-square-foot property located on 6th Street in San Francisco. Defendants agreed to lease the property from plaintiff for a period of five years, commencing on July 15, 2008. For the first year of the lease, defendants were to pay a monthly rent of \$4,750. Pursuant to section 3.2 of the lease, defendants' rent was adjusted annually. In the last year of the lease, July 2012 to July 2013, defendants' monthly rent was \$6,062.34.

Under section 2.2 of the lease, defendants had an option to extend the agreement for an additional period of five years. To exercise the option, defendants were required to provide written notice to plaintiff at least 180 days prior to the expiration of the lease term, i.e., by January 31, 2013. The lease states that, once exercised, the option is "irrevocable." As to the rent during the five-year extension, section 2.3 of the lease provides: "At each option date the 'Rent' will be adjusted to market rate but to be no less than the then current rent. Market rate to be established by landlord upon obtaining written confirmation from a local reputable (realtor) leasing agent."

On January 29, 2013, defendants provided plaintiff with written notice "confirming" they were exercising their option to renew the lease. About three months later, on April 26, 2013, plaintiff sent defendants an "addendum" to the lease, which set forth the new rental rates for the renewed five-year term. According to the addendum, defendants' monthly rent would start at \$7,000 for the first year of the new term, and would increase about 6 percent each year thereafter. Defendants replied to plaintiff on May 3, 2013, stating they were "most pleased" to renew the lease. Defendants also

---

<sup>1</sup> As the parties elected to proceed without a court reporter at trial and defendant has not submitted a settled statement, the following facts are taken almost entirely from the clerk's transcript.

indicated Urban Solutions would review the agreement for them and contact plaintiff about “a few minor points.” Defendants now assert, without citation to the record, that they had no objections to the initial increase to \$7,000, but were concerned about the subsequent 6 percent increases.

On May 7, 2013, plaintiff emailed defendants, stating he was officially withdrawing his offer to renew the lease at the rate terms set forth in his April 26 correspondence. Plaintiff’s email also stated he would “do further research and get back to [defendants] with [a] new proposal.” On May 16, 2013, plaintiff proposed a new rent of \$9,000 per month, with a 3 percent increase per year. Plaintiff explained that, based on his analysis of other properties in the area and his reliance on an impartial realtor, he had determined the market rate for the property was \$10,980 to \$12,000 per month. However, since defendants were a “ ‘known’ person and existing tenant,” plaintiff was willing to offer a lower rent.

The parties appear to dispute what happened next. In their appellate briefing, defendants contend plaintiff informed them that if they did not accept his proposal by a certain date, the rent would be increased to \$10,000 per month. Plaintiff’s appellate briefing asserts he later reduced his rent proposal to \$8,000 per month, with a 3 percent increase per year. Defendants offer no record support for their contention. The only support offered by plaintiff is a factual assertion in his own trial brief, which is not evidence.

Whatever plaintiff’s final proposal was, defendants were unwilling to accept it. On June 26, 2013, defendants informed plaintiff they were finalizing arrangements for a new space, stating “there is a great probability that we will not be renewing.” Plaintiffs vacated the premises on June 30, 2013, the last day of the original lease term. According to defendants’ appellate briefing, the premises remained vacant until January 2014, when plaintiff found a tenant who was willing to pay a monthly rent of \$8,000.

Plaintiff filed a complaint for “breach of lease contract” and breach of the implied covenant of good faith and fair dealing. Defendants subsequently filed a cross-complaint

for breach of contract and fraud. A one-day bench trial was held on August 21, 2014. The parties elected to proceed without a court reporter.

On August, 29, 2014, the trial court issued a statement of decision. The court held defendants exercised their option to renew the lease and thus were responsible for the lost rental value of the property during the six-month period it remained vacant. The court set the “fair market value” of the property at \$8,000 per month, and ordered defendants to pay \$48,000 in lost rent to cover the six months the property remained vacant. Defendants were also ordered to pay \$12,000 to compensate plaintiff for the real estate broker hired to lease the space. Additionally, the court held defendants were responsible for damages to the premises. After deducting the withheld security deposit, the court found plaintiff was entitled to an additional \$1,330.64. Judgment was entered in favor of plaintiff in the amount of \$61,330.64.

Plaintiff subsequently filed a motion for attorney fees. The briefing on the motion has not been included in the record, but the motion appears to have been based on section 30.3 of the lease agreement, which allows the prevailing party to recover attorney fees in the event of litigation over the contract. The trial court granted the motion, finding plaintiff was entitled to attorney fees of \$20,430.29, in addition to \$1,480.80 in costs.

## **II. DISCUSSION**

### ***A. Standard of Review***

This appeal presents both questions of fact and law. “Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is

predominantly legal and its determination is reviewed independently.” (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

***B. There Was No Requirement Defendants Consent to the Rental Amount***

Defendants argue they did not exercise the option to renew because they never agreed to the amount of rent for the option period. According to defendants, once plaintiff withdrew his offer to renew the lease at \$7,000 per month, “the parties fell out of contract and there was no agreement.” Defendants further argue the parties’ subsequent conduct established an intent to renegotiate the rental amount. Because the parties failed to reach an agreement on the amount of rent, defendants assert they were not bound to continue leasing the property.

We are not persuaded. The lease expressly provides the parties shall be bound by the lease for an additional term of five years in the event defendants provided written notice they were exercising their option to extend the lease. Defendants exercised this option by providing written notice to plaintiff on January 29, 2013. Specifically, they stated: “[W]e are confirming that we are exercising our right to renew the lease . . . .” There was nothing ambiguous about this confirmation, and defendants did not condition it on their agreement to the amount of rent.

The parties’ subsequent negotiations over the amount of rent did not void defendants’ agreement to extend the lease term. According to the lease agreement, once exercised, the option was “irrevocable.” Defendants make much of the fact that they did not agree to the new rent proposed by plaintiff for the extended term. However, as the trial court held, “There was no requirement that there be an agreement on price.” Rather, upon exercise of the option, the rent was to be adjusted to the market rate, which the lease agreement authorized plaintiff to establish upon obtaining confirmation from a leasing agent. Defendants have pointed to nothing in the record indicating plaintiff failed to acquire such confirmation. Contrary to defendants’ contentions, the parties did not “[a]ll out of contract.” They agreed to the terms of an irrevocable option and defendants elected to exercise that option.

The authority relied upon by defendants on this point is inapposite. At issue in *Colyear v. Tobriner* (1936) 7 Cal.2d 735, 737, was a one-year lease agreement providing the tenant with the option to renew for an additional two-year term at a monthly rent which was not to exceed the original rent by more than 20 percent. Near the end of the original one-year term, the tenant informed the property owners he would renew the lease by exercising the option, adding that he “ ‘assume[d] the monthly rental would remain the same, as conditions do not warrant any change.’ ” (*Id.* at p. 738.) The property owners refused the offer and indicated they would not renew the lease for a rental of less than \$54 per month, a 20 percent increase in the rent. (*Ibid.*) The court held the tenant had not exercised the option because he failed to inform the property owners he would agree to the increased rent. (*Id.* at p. 740.) In contrast, in the instant action, defendants did not condition or qualify their agreement to renew the lease term, and their objections to the proposed rent increase were not made until *after* they exercised an irrevocable option to renew.<sup>2</sup>

### ***C. The Option Is Enforceable***

Next, defendants contend the option is unenforceable because it left an essential term to future agreement, and did not contain an ascertainable standard for determining rent. We disagree on both counts.

It is now well settled that an option agreement is unenforceable where it leaves an essential term to future agreement. (*Etco Corp. v. Hauer* (1984) 161 Cal.App.3d 1154, 1158 (*Etco*.) As our Supreme Court explained in *Ablett v. Clauson* (1954) 43 Cal.2d 280, 284–285: “ ‘Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until

---

<sup>2</sup> That the lease agreement did not require defendants to consent to the rental amount does not mean they had no power to negotiate. Defendants could have inquired as to the rent for the renewal period prior to exercising the option to renew. They could have also informed plaintiff they would not exercise the option if his rent demands were too high.

such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.’ ” Based on these principles, the court in *Ablett* held the renewal option at issue was unenforceable because it fixed only the duration of a new lease, leaving all the other provisions of the renewed lease to future agreement. (*Id.* at p. 286.) The court further held it could not fix the provisions of the new lease in the absence of ascertainable standards in the option agreement, concluding: “In these circumstances, the terms of the option are too uncertain to make it enforceable as a contract right.” (*Ibid.*)

This court addressed a similar issue in *Etco, supra*, 161 Cal.App.3d 1154. In that case, the parties entered into a five-year commercial lease agreement, which also granted the lessee the option to extend the lease for an additional five years “ ‘under the same terms and conditions except for the rent which shall be determined by mutual agreement at that time.’ ” (*Id.* at pp. 1155–1156.) The lessee gave timely notice of her desire to renew the lease, but the parties were unable to agree on an acceptable rent. (*Id.* at p. 1156.) The court held the option was unenforceable because it contained no ascertainable standard for determining rent for the renewal period. (*Id.* at p. 1162.) The court reasoned a rule requiring an option to provide ascertainable standards “recognizes the reality that fluctuating market conditions will often preclude the determination of an appropriate rent for a renewal period at the time an initial lease is made, yet prevents the courts from being required to engage in the drafting of contracts for parties in the absence of guidelines for an objective determination of such rent.” (*Id.* at p. 1161, fn. omitted.)

In this case, the renewal option neither left an essential term to future agreement nor lacked an ascertainable standard for determining rent. The parties agreed the lease term could be extended on all provisions contained in the original lease agreement, with the exception of rent, which would be adjusted to the market rate by plaintiff upon obtaining written confirmation from a local leasing agent. Defendants are correct that an option allowing a lessor to unilaterally set the rent at whatever rate he or she desires would be unenforceable. But that is not the case here, as the lease agreement required

plaintiff to set the rent at the market rate. Plaintiff's discretion was further constrained by the requirement that a reputable leasing agent confirm his estimation of the market rate, and the implied covenant of good faith and fair dealing precluded plaintiff from setting the rent at an unreasonable rate based on a sham appraisal.<sup>3</sup>

**D. Defendants Cannot Show Plaintiff Breached the Agreement**

Defendants contend plaintiff breached the agreement by demanding rent exceeding the market rate. They point out the trial court found the "fair market value" of the property was \$8,000 per month, while plaintiff was at one point demanding a monthly rent of \$9,000. The implication appears to be that by demanding above-market rent, plaintiff committed a material breach excusing defendant's performance on the contract. But the trial court implicitly held otherwise, and defendants have failed to show that determination was not supported by substantial evidence.

A material breach of a contract excuses further performance by the nonbreaching party. (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863.) "Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. [Citations.] Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' [Citations.] 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' "

(*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–278.)

The contract term at issue in this case required plaintiff to set the rent for the option period at the market rate. Plaintiff initially offered to rent to defendants at \$7,000 per month, with a 6 percent increase per year. On May 16, 2013, plaintiff withdrew that

---

<sup>3</sup> Defendants' reliance on *Wu v. Interstate Consolidated Industries* (1991) 226 Cal.App.3d 1511, is misplaced. In that case, the court held that a lease provision setting the rent during the option term at the "fair market rental value" required a determination of the rent based upon the particular purpose for which the premises were leased, rather than its highest and best use. (*Id.* at p. 1513.) To the extent the "market rate" and "fair market value" are synonymous, there is no indication either plaintiff or the trial court assessed defendants' rent based on the highest and best use of the property.

offer and demanded a monthly rent of \$9,000, with a 3 percent increase per year. In his trial brief, plaintiff asserted he subsequently lowered his demand to \$8,000 per month, though it is unclear whether he produced evidence to that effect at trial. According to the statement of decision, plaintiff's real estate consultant set the market rate at \$9,000 per month, while defendants' set the market rate at \$7,000. The statement of decision did not expressly reach the issue of whether plaintiff breached the contract by demanding rent exceeding the market rate. However, for the purposes of calculating plaintiff's damages, the court held the property's "fair market value" was \$8,000 per month.

In ruling for plaintiff on his claim for breach of contract, as well as on the breach of contract claims asserted in defendants' cross-complaint, the trial court implicitly found plaintiff did not commit a material breach. We must defer to the trial court's findings of fact on this issue unless they are not supported by substantial evidence. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) Because there is no trial transcript or settled statement, defendants cannot challenge the sufficiency of the evidence here. As their appeal is based solely on the clerk's transcript, "every presumption is in favor of the validity of the judgment and all facts consistent with its validity will be presumed to have existed. The sufficiency of the evidence is not open to review. The trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding on the appellate court, unless reversible error appears on the record." (*Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924.)

Moreover, contrary to defendants' contentions, the trial court's decision to set the fair market value of the subject property at \$8,000 per month is not inconsistent with its findings on the parties' breach of contract claims. Nor does it support a finding that plaintiff committed a material breach. The trial court may have concluded plaintiff acted in accordance with the lease agreement by offering to rent the subject property to defendants at the market rate of \$8,000. In his trial brief, plaintiff asserted this was his final offer to defendants, and defendants have pointed to nothing in the record suggesting the assertion was unfounded. It is also conceivable the trial court found plaintiff breached the contract by demanding \$9,000—\$1,000 more than the market rate—but

concluded the breach was not material. Alternatively, the trial court could have concluded defendant's \$9,000 offer was consistent with the lease agreement as it was confirmed by a realtor, but it decided to use a lower rent to calculate plaintiff's damages. There are, of course, other possibilities. But in light of the slim record, we must presume the trial court's findings were consistent with its decision.

Defendants further argue the trial court misconstrued the plain language of the lease agreement, which they claim precluded plaintiff from demanding \$9,000 to \$10,000 in monthly rent. We remain unconvinced. Defendants point out that section 2.2 of the agreement states that upon extension of the lease term, the rent "shall be adjusted annually in accordance with Section 3.2." Section 3.2 provides:

"Commencing on the first anniversary of the Term Commencement Date, Rent shall be adjusted annually, including during the Extension, if any, as follows:

"July 1, 2009 to June 30, 2010—\$5,236.88 per month

"July 1, 2010 to June 30, 2011—\$5,498.72 per month

"July 1, 2011 to July 30, 2012—\$5,773.65 per month

"July 1, 2012 to July 30, 2013<sup>[4]</sup>—\$6,062.34 per month"

Defendants argue that, reading section 2.2 in conjunction with section 3.2, it is clear the parties intended the rent to increase by no more than 5 percent per year. This would mean the rent for the first year of the option period could be no more than \$6,365.46. But section 3.2 provides no direction as to how rent should be set during the option period, which was to commence in July or August 2013. The only meaningful guidance on this issue is set forth in section 2.3 of the agreement, which provides that, at each option date, the rent is to be set at the market rate. To the extent there is an ambiguity about whether section 3.2 caps rent increases at 5 percent, extrinsic evidence concerning the parties' intent could be considered. (See *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

---

<sup>4</sup> Defendants assert there is a typographical error in section 3.2, and the original term of the lease actually concluded on June 30, 2013, not July 30, 2013.

But since there is no transcript or settled statement available, we must defer to the trial court's implied findings on this issue.<sup>5</sup> (See Cal. Rules of Court, rule 8.163.)

***E. Defendants Cannot Show Plaintiff Failed to Mitigate His Damages***

The trial court found defendants were responsible for six months of lost rent because the premises were vacant for that amount of time after defendants breached. Defendants now argue plaintiff incurred these losses only because he was demanding a rent well above the market rate. Defendants contend plaintiff could have mitigated his losses and found a new tenant sooner if he had lowered his asking price, and thus the damage award should be reduced accordingly.

Once again, the lack of a trial transcript or settled statement is fatal to defendants' appeal. Defendants have pointed to nothing in the record that would shed any light on plaintiff's efforts to find a new tenant. They suggest plaintiff was only able to find a tenant after he reduced the rent to \$8,000, but provide no record citation to support the assertion. To the extent evidence was offered on this issue at trial, it does not appear in the record on appeal. We therefore cannot discern the rental rate at which the property was advertised, let alone conclude plaintiff turned away potential tenants by setting the rent above the market rate.

Nor can we conclude the subject property remained vacant for an unusually long period of time. In order to exercise the option to renew the lease, defendants were required to provide plaintiff with notice about six months prior to the expiration of the lease agreement's original term. This suggests the parties anticipated it would take plaintiff at least six months to find a new tenant. Moreover, defendants left plaintiff little time to find a new tenant before they vacated the premises. It was not until June 26,

---

<sup>5</sup> Moreover, the facts set forth in defendants' appellate briefing are inconsistent with their assertion that both parties understood rent increases would be capped at 5 percent per year. Defendants claim that they did not object to plaintiff's initial rent demand of \$7,000, even though it constituted a 15 percent increase over their then current rent.

2013, four days before defendants vacated, that they informed plaintiff there was a “great probability” they would not be renewing their lease.

***F. The Trial Court Properly Ordered Defendants to Pay Plaintiff’s Broker’s Fees***

Defendants challenge the trial court’s decision to hold them responsible for plaintiff’s broker’s fees of \$12,000. The court reasoned the fees were incurred as a result of defendants’ breach. Defendants disagree, arguing that had the breach not occurred plaintiff would have still needed to retain a broker to relet the space at the end of the option period.

The argument is unavailing. As an initial matter, it is possible plaintiff would not have required the services of a broker had defendants provided him with adequate notice of their decision not to renew, as required by the contract. Moreover, the award of broker’s fees was necessary to make plaintiff whole and put him in the position he would have been in had no breach occurred. As a result of the breach, plaintiff needed to retain a broker to lease the premises after defendants vacated, and he may need to do so again at the conclusion of the new tenant’s lease term. On the other hand, had the breach not occurred, plaintiff would have only had a need for a broker at the end of the option period.

Defendants further argue plaintiff’s broker did not provide sound advice as to the fair rental value of the property, resulting in plaintiff demanding rent above the market rate from defendants. However, it appears the trial court agreed with the broker’s conclusions, as it found plaintiff’s rent demands did not constitute a breach of the lease agreement. And in the absence of a trial transcript or a settled statement, we cannot second-guess the trial court’s findings on this issue. Even if the broker’s advice was unsound, it is unclear why that should affect plaintiff’s ability to recover fees paid for his services.

***G. The Attorney Fee Award Is Proper***

Finally, defendants argue that, should we find the trial court erred in awarding plaintiff lost rent and broker’s fees, we should also reverse the award of attorney fees because plaintiff would no longer be the prevailing party. As we affirm the trial court’s

disposition of the breach of contract claims, we shall leave the attorney fee award undisturbed.

### **III. DISPOSITION**

The judgment is affirmed. Costs to plaintiff.

---

Margulies, J.

We concur:

---

Humes, P.J.

---

Banke, J.

A143642

