Nat'l Adver. Co. v. Potter

Court of Appeals of Texas, First District, Houston
April 3, 2008, Opinion Issued
NO. 01-06-01042-CV

Reporter: 2008 Tex. App. LEXIS 2462; 2008 WL 920338

NATIONAL ADVERTISING COMPANY, Appellant v. LARRY E. POTTER, Appellee

Subsequent History: Petition for review denied by *Nat'l Adver. Co. v. Potter, 2008 Tex. LEXIS 676 (Tex., July 18, 2008)*
Related proceeding at Potter v. Clear Channel Outdoor, Inc., 2009 Tex. App. LEXIS 5077 (Tex. App. Houston 1st Dist., July 2, 2009)
Related proceeding at CBS Outdoor, Inc. v. Potter, 2013 Tex. App. LEXIS 645 (Tex. App. Houston 1st Dist., Jan. 24, 2013)

Prior History: **[*1]** On Appeal from the 270th District Court, Harris County, Texas. Trial Court Cause No. 2005-60481.

Core Terms

lease, terminate, renew, expire, right of first refusal, holder, trial court, billable, display, option to purchase, notice, terms of the offer, right to remove, ambiguous, fabricate, install, rend, outdoor advertising, right to purchase, renewal term, harmonize, covenant, demised, elect, current market value, option contract, reasonable time, advertize, billion

Case Summary

Procedural Posture

Appellee lessor sought a declaratory judgment that appellant lessee exercised its right of first refusal, as afforded in the parties' leases, when it rejected the lessor's renewal terms and that, because the leases were not renewed, the lessor was entitled to purchase billboard structures and permits from the lessee. The 270th District Court, Harris County, Texas, rendered judgment in favor of the lessor on those points. The lessee sought review.

Overview

The lessee leased ground space to place billboard signs on the lessor's land. When the common lease period expired, a dispute arose concerning renewal of the leases and the rights to the billboard structures. The court found that the lessee exercised its right of first refusal when it rejected the lessor's counteroffer for renewal. The lessor did not make a general promise or covenant to renew the leases. To the contrary, the leases expressly provided that the lessor merely granted the lessee the right of first refusal to continue to rent the property for advertising purposes if the lessor elected to rent or use it for outdoor advertising purposes. The leases were not ambiguous, and the word ″terminate″ used in the leases included the expiration of the lease term. Applying the same definition of ″terminate″ throughout the leases' provisions, paragraph four granted the lessee the right to remove its signs within 120 days after the leases expired. However, such right was subject to the option that the lessee granted to the lessor to first purchase the signs. The exercise of the lessor's option fully compensated the lessee for the cost of erecting brand new signs on another property.

Outcome

The court affirmed the judgment of the trial court.

LexisNexis® Headnotes

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Appellate Review

HN1 Declaratory judgments are reviewed under the same standards as other judgments. *Tex. Civ. Prac. & Rem. Code Ann. § 37.010* (1997).

Contracts Law > Contract Interpretation > General Overview

HN2 In construing a written contract, the primary concern is to ascertain and give effect to the parties' intentions as expressed in the document. Courts consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement. No single provision is given controlling effect. In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms. Courts construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served, and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive. If, after the pertinent rules of

construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous, and courts construe it as a matter of law. However, if the meaning of the contract remains uncertain or is susceptible to more than one reasonable interpretation, it is ambiguous. Whether a contract is ambiguous is a question of law to be determined by looking at the contract as a whole in light of the circumstances present when the contract was entered.

Contracts Law > Formation of Contracts > Right of First Refusal
Contracts Law > Types of Contracts > Option Contracts
Real Property Law > ... > Lease Agreements > Commercial Leases > General Overview

HN3 Generally, a right of first refusal, also known as a preemptive right or a preferential right of purchase, is a right granted to a party giving it the first opportunity to purchase property if the owner decides to sell it. This concept has, however, been used in the context of a lease renewal. A right of first refusal has a generally well-established meaning in the business world as giving the holder of such a right the first opportunity to purchase property from the owner on the same terms offered by any third party. Once the property owner conveys the terms of the offer to the holder of the right of first refusal, he then has the power to accept or reject the offer. In addition, upon the notification of the owner's election to convey an interest in the property and the terms of the offer, the holder's right matures into an enforceable option. The terms of the option are formed by the provision granting the preferential right and by the provisions contained within the notice of intent given to the holder. Once the owner gives notice of his intent, he cannot change the terms of the offer as long as the option is binding. When the holder gives notice to the owner of his acceptance of the offer, a contract is formed.

Contracts Law > Formation of Contracts > Acceptance > General Overview
Contracts Law > Types of Contracts > Option Contracts

HN4 Acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the offer.

Contracts Law > Formation of Contracts > Right of First Refusal
Contracts Law > Types of Contracts > Option Contracts

HN5 A failure to exercise an option according to its terms is simply ineffectual, and legally amounts to nothing more than a rejection. Never has a right of first refusal been understood to mean that the holder has a privilege to first negotiate with the seller.

Contracts Law > Formation of Contracts > Right of First Refusal
Contracts Law > Types of Contracts > Option Contracts

HN6 The holder of an option has purchased the right to compel a transfer of property on stated terms, prior to the expiration of the option. Option contracts have two components: (1) an underlying contract that is not binding until accepted; and (2) a ″covenant″ to hold open to the optionee the opportunity to accept. Unlike an option contract, a right of first refusal is merely a preemptive right that does not grant the holder the power to compel an unwilling owner to transfer his property.

Real Property Law > Landlord & Tenant > Lease Agreements > Lease Provisions

HN7 A covenant to renew that leaves the renewal rate to be decided by the parties in the future is unenforceable and void for uncertainty and indefiniteness.

Contracts Law > Contract Interpretation > General Overview

HN8 In harmonizing provisions of a contract, terms stated earlier in an agreement must be favored over subsequent terms. However, courts also must construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served.

Judges: Panel consists of Justices Taft, Hanks, and Higley.

Opinion by: Laura Carter Higley

Opinion

MEMORANDUM OPINION

Appellant, National Advertising Company (″National″), [1] leased ground space, pursuant to three identical lease agreements (″Lease(s)″), to place billboard signs on three tracts of land of appellee, Larry E. Potter. When the common lease period expired, a dispute arose concerning renewal of the Leases and the rights to the billboard structures. Potter sought a declaratory judgment that National exercised its right of first refusal, as afforded in the Leases, when it rejected Potter's renewal terms and that, because the Leases were not renewed, Potter was entitled to purchase the billboard structures and permits from National. The trial court rendered judgment in favor of Potter on these points, and National appealed.

In **[*2]** two issues, National contends that the trial court erred by misconstruing certain terms of the Leases. National asks this court to find as a matter of law that

[1] National was substituted for Viacom Outdoor Inc. (″Viacom″) as defendant and cross-plaintiff. National and Potter stipulated by Rule 11 Agreement that all prior filings, pleadings, and discovery made by, on behalf of, or to Viacom have the same effect as if made by, on behalf of, or to National.

National is entitled to renew the Leases or, alternatively, to remove its billboard structures from Potter's land.

We affirm.

Background

On August 1, 1995, National and Potter executed the three identical [2] ground Leases at issue. Pursuant to each Lease, National was permitted to erect billboard signs on each of three tracts of land belonging to Potter in exchange for the greater of a fixed monthly rental or a percentage of the gross income National derived from selling advertising space on the billboard signs. The Leases were for a 10-year term, and, pursuant to paragraph nine of the Leases, at the end of that term, if Potter chose to further rent or use his land for outdoor advertising, National would have a right of first refusal with respect to leasing the land.

The Leases expired on July 31, 2005. National contacted Potter, offered to renew the Leases, and included a proposed new holdover provision. Potter refused to renew under such terms and, instead, **[*3]** sent a counter-offer. National refused to renew the Leases under the terms proposed by Potter.

Subsequently, Potter sought to exercise a right to purchase the billboard sign structures, pursuant to paragraph three of the Leases, which provides as follows:

> 3. Lose [sic] of Use of Sign Structures. If at any time the highway view of [National's] displays is obstructed or obscured, or the use or installation of such displays is prevented or restricted by law or by [National's] inability to obtain or maintain any necessary permits or licenses, or if there occurs a diversion of traffic from, or a change in the direction of traffic on highways leading past [National's] displays, [National] may, at its option, terminate this lease as to such specific location by giving 30 days written notice to [Potter]. In the event of such cancellation or in the event this lease is terminated for any reason and the parties have not executed a new lease or renewal of this Lease, [Potter] shall have the option to purchase the entire sign structure and permits from [National] for the then current market value of an installed fabricated structure, such value to be determined by the average of three (3) bids to **[*4]** be obtained from three (3) major sign fabricators.

National sought to enter and remove its billboard signs from Potter's land, pursuant to paragraph four of the Leases, which provides as follows:

> 4. Ownership of Displays. All structures, displays and materials placed on the said property are [National's] trade fixtures and equipment and shall be and remain [National's] property, and may be removed by [National] at any time prior to or within a reasonable time (not to exceed 120 days) after the termination of this lease, or any extension thereof. [Potter] agrees to allow [National] full access to the property occupied by the displays for the purpose of erecting, maintaining, changing or removing the displays at any reasonable time.

Potter sued National, seeking a declaratory judgment that National had exercised its right of first refusal under paragraph nine by rejecting Potter's proposed renewal terms and that Potter was entitled to purchase the sign structures and permits from National under paragraph three. In addition, the parties filed an agreed motion for partial judgment, pursuant to *Texas Rule of Civil Procedure 263*, asking the trial court to determine whether paragraphs three, **[*5]** four, and nine of the Leases were ambiguous and, if so, to declare that a fact issue exists that must be tried to a jury and, if not, to order relief consistent with the trial court's interpretation of the Leases.

Ultimately, in its final judgment, the trial court declared that the Leases are not ambiguous; that ″National exercised its right of first refusal as evidenced by the correspondence submitted by the parties as part of the agreed facts″; that the word ″termination″ as used in the Leases includes the expiration of the lease term; and that ″Potter had the right to purchase the sign structures and permits from [National] for the current market value of an installed fabricated structure pursuant to the [Leases] upon termination of the [Leases] for any reason, including expiration.″ The trial court awarded attorney's fees and costs to Potter. National appealed, contending that the trial court misconstrued the terms and provisions of the Leases.

Standard of Review

HN1 Declaratory judgments are reviewed under the same standards as other judgments. *See*TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (Vernon 1997).

HN2 In construing a written contract, the primary concern is to ascertain and give effect **[*6]** to the parties' intentions as expressed in the document. *Frost Nat'l Bank v. L&F Distribs., Ltd., 165 S.W.3d 310, 311-12 (Tex. 2005)*. We consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole

[2] The Leases differed only with regard to the tract of property affected.

agreement. *Id. at 312*. No single provision is given controlling effect. *J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003)*. ″In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms.″ *Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983)*. We construe contracts ″from a utilitarian standpoint bearing in mind the particular business activity sought to be served,″ and ″will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.″ *Frost Nat'l Bank, 165 S.W.3d at 312* (quoting *Reilly v. Rangers Mgmt., Inc., 727 S.W.2d 527, 530 (Tex. 1987)*).

If, after the pertinent rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous, and we construe it as a matter of law. *Id.* However, if the meaning of the contract remains uncertain or is susceptible to **[*7]** more than one reasonable interpretation, it is ambiguous. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)*; *Coker, 650 S.W.2d at 393-94*.

Whether a contract is ambiguous is a question of law to be determined ″by looking at the contract as a whole in light of the circumstances present when the contract was entered.″ *Coker, 650 S.W.2d at 394*. A court may conclude that a contract is ambiguous even in the absence of such a pleading by either party. *Sage St. Assocs. v. Northdale Constr. Co., 863 S.W.2d 438, 445 (Tex. 1993)*.

Renewal of the Leases

In its second issue, National contends that the trial court erred by declaring that National exercised its contractual right of first refusal when it declined to accept the terms of Potter's renewal offer. We construe National's contention to be that it possessed the right to renew the Leases on their original terms.

Paragraph nine of the Leases provides that

> [a]t the termination of this lease, [Potter] does hereby grant [National] the right of first refusal to continue to rent the demised property for advertising purposes if [Potter] elects to rent or use the demised premises for outdoor advertising purposes. The right of **[*8]** first refusal shall expire one (1) month after the lease expires.

The Leases expired July 31, 2005. The record shows that National informed Potter, by letter dated August 10, 2005, that it wished to renew the Leases for a 10-year term. National proposed that the terms remain the same, except that any holdover at the end of the new term would be on a month-to-month basis until a new agreement was entered. By letter dated August 25, 2005, Potter declined to renew the Leases with National's proposed holdover provision. Instead, Potter offered to renew the Leases on his proposed renewal terms, the substance of which are not in the record. National declined to accept renewal on Potter's terms.

National contends, and Potter does not dispute, that the correspondence between the parties demonstrates that Potter did ″elect[] to rent or use the demised premises for outdoor advertising purposes″--whether through renewing National's leases or through buying the signs for his own use. National contends that it ″[t]herefore, had a 'right of first refusal' to re-lease the property.″ National also contends that ″the right of first refusal [was] triggered at the time the Leases [were] terminated.″

HN3 Generally, **[*9]** a right of first refusal, also known as a pre-emptive right or a preferential right of purchase, is a right granted to a party giving it the first opportunity to purchase property if the owner decides to sell it. *Abraham Inv. Co. v. Payne Ranch, Inc., 968 S.W.2d 518, 524 (Tex. App.--Amarillo 1998, pet. denied)* (citing *Holland v. Fleming, 728 S.W.2d 820, 822 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.)*). This concept has, however, been used in the context of a lease renewal. *See, e.g., Kaplan v. Floeter, 657 S.W.2d 1, 2-3 (Tex. App.--Houston [1st Dist.] 1983, no writ)*. A right of first refusal has a generally well-established meaning in the business world as giving the holder of such a right the first opportunity to purchase property from the owner on the same terms offered by any third party. *Abraham Inv. Co., 968 S.W.2d at 524*; *Palmer v. Liles, 677 S.W.2d 661, 665 (Tex. App.--Houston [1st Dist.] 1984, writ denied)*. Once the property owner conveys the terms of the offer to the holder of the right of first refusal, he then has the power to accept or reject the offer. *Abraham Inv. Co., 968 S.W.2d at 524*. In addition, upon the notification of the owner's election to convey **[*10]** an interest in the property and the terms of the offer, the holder's right matures into an enforceable option. *See id.; Riley v. Campeau Homes (Texas) Inc., 808 S.W.2d 184, 188 (Tex. App.--Houston [14th Dist.] 1991, writ dism'd)*; *Holland, 728 S.W.2d at 822-23*. The terms of the option are formed by the provision granting the preferential right and by the provisions contained within the notice of intent given to the holder. *Abraham Inv. Co., 968 S.W.2d at 524-25*. Once the owner gives notice of his intent he cannot change the terms of the offer as long as the option is binding. *Id. at 525*; *Holland, 728 S.W.2d at 822-23*. When the holder gives notice to the owner of his acceptance of the offer, a contract is formed. *Abraham Inv. Co., 968 S.W.2d at 525*.

Here, by the express terms of paragraph nine, National's right of first refusal was triggered if Potter manifested his

intent ″to rent or use the demised premises for outdoor advertising purposes.″ Specifically, as Potter contends, National's first right of refusal was triggered by Potter's August 25, 2005 correspondence notifying National that Potter would re-lease the properties for outdoor advertising and specifying the terms.

Once Potter **[*11]** gave notice of his intent, National's right of first refusal ripened into an option. *See* Riley, 808 S.W.2d at 188; Holland, 728 S.W.2d at 822. Before its option could ripen into an enforceable contract, however, National had to manifest its acceptance in strict compliance with the terms that Potter offered. *See* Probus Props. v. Kirby, 200 S.W.3d 258, 262 (Tex. App.--Dallas 2006, pet. denied). ***HN4*** Acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the offer. Crown Constr. Co., Inc. v. Huddleston, 961 S.W.2d 552, 558 (Tex. App.--San Antonio 1997, no writ). ***HN5*** A failure to exercise an option according to its terms is simply ineffectual, and legally amounts to nothing more than a rejection. *Id.* Never has a right of first refusal been understood to mean that the holder has a privilege to first negotiate with the seller. Abraham Inv. Co., 968 S.W.2d at 525.

Here, National declined to renew the Leases on the terms offered by Potter in his August 25, 2005 correspondence. Hence, National exercised its right of first refusal when it rejected Potter's offer.

National contends that its right of first refusal constituted a contractual right to renew the **[*12]** Leases on their original terms. [3] National contends that because the renewal terms governing the right-of-first-refusal provision are ″not clarified in the Leases,″ the provision simply operates as a ″general extension or renewal clause″ and it is implied that the renewal terms would be the same as those agreed to in the original Leases, relying on Aldridge v. Young, 689 S.W.2d 342 (Tex. App.--Fort Worth 1985, no writ).

In *Aldridge,* the court examined a provision which stated that ″[t]he lease shall be renegotiated″ within a certain period surrounding the expiration date of each lease and that ″[t]he lessee has the option to extend this lease.″ Id. at 345-46. There, the appellees argued that any extension or option to extend the lease was invalid because the lease failed **[*13]** to specify the amount of rent applicable to the extended term. Id. at 347. In concluding that the renewal terms would be the same as that in the original lease, the court explained that ″[i]t is an established rule that a general covenant to renew or extend a lease which is silent as to the terms of the renewal or extension implies a renewal or extension upon the same terms and conditions as provided in the original lease. . . .″ *Id.*

There is an important distinction between Aldridge and the case at hand. In *Aldridge,* the lessee was granted an ″option,″ which the court considered ″a general covenant to renew or extend″ the lease. ***HN6*** The holder of an option has purchased the right *to compel* a transfer of property on stated terms, prior to the expiration of the option. Riley, 808 S.W.2d at 187. Option contracts have two components: (1) an underlying contract that is not binding until accepted and (2) a ″covenant″ to hold open to the optionee the opportunity to accept. *Id.*

Unlike an option contract, a right of first refusal is merely a pre-emptive right that does not grant the holder the power to compel an unwilling owner to transfer his property. *See* ACS Inv. Inc. v. McLaughlin, 943 S.W.2d 426, 428 n.2 (Tex. 1997); **[*14]** Riley, 808 S.W.2d at 187. Here, Potter did not make a general promise or covenant to renew the Leases. To the contrary, the Leases expressly provide that Potter merely granted National ″*the right of first refusal* to continue to rent the demised property for advertising purposes *if* [Potter] elects to rent or use the demised premises for outdoor advertising purposes.″ (Emphasis added.) Once Potter elected to lease the property, National was granted the right to accept or reject the terms. National was given the first right of refusal and refused Potter's offer. [4]

Accordingly, National's second issue is overruled.

The Billboard Signs

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[3] The original terms of the Leases were for graduated rents. For the first through third years, National's rent was $ 750.00 per month. For the fourth through seventh years, National's rent was $ 1,000.00 per month. For the eighth through tenth years, National's rent was $ 1,250.00 per month. It is not clear if National expected that, in renewing the Leases under their original terms, it would return to $ 750 per month.

[4] We recognize that ***HN7*** ″a covenant to renew that leaves the renewal rate to be decided by the parties in the future is unenforceable and void for uncertainty and indefiniteness.″ Kaplan v. Floeter, 657 S.W.2d 1, 2-3 (Tex. App.--Houston [1st Dist.] 1983, no writ). In *Kaplan,* this court had before it the following provision in a lease agreement:

> *Right of First Refusal.* Before thirty (30) days prior to the expiration of the primary term, Lessee shall have the absolute and irrevocable right to lease said premises for an additional term of five (5) years upon the same terms and conditions, except that the monthly lease payments shall **[*15]** be increased to an amount mutually acceptable to the parties hereto; or in the event that the parties hereto are unable to mutually agree to said new lease payment amount, Lessee shall, for a period of thirty (30) days after Lease termination, have the right of first refusal to

In its first issue, National contends **[*16]** that the trial court erred by failing to give effect to all of the provisions of the Leases. Specifically, National contends that the trial court erred by declaring that Potter had the right to purchase the billboard signs, rather than declaring that National had the right to remove the signs, because the trial court misconstrued paragraphs three and four of the Leases.

After the parties failed to reach an agreement regarding the renewal of the Leases, Potter informed National, by letter dated September 1, 2005, that he would exercise his right under the Leases to purchase the billboard sign structures and permits.

Pursuant to paragraph three:

> 3. Lose [sic] of Use of Sign Structures. If at any time the highway view of [National's] displays is obstructed or obscured, or the use or installation of such displays is prevented or restricted by law or by [National's] inability to obtain or maintain any necessary permits or licenses, or if there occurs a diversion of traffic from, or a change in the direction of traffic on highways leading past [National's] displays, [National] may, at its option, terminate this lease as to such specific location by giving 30 days written notice to [Potter]. **[*17]** In the event of such cancellation *or in the event this lease is* ***terminated*** *for any reason and the parties have not executed a new lease or renewal of this Lease,* [Potter] shall have the option to purchase the entire sign structure and permits from [National] for the then current market value of an installed fabricated structure, such value to be determined by the average of three (3) bids to be obtained from three (3) major sign fabricators.

(Emphasis added.)

The word ″terminated,″ emphasized above, is not defined in the Leases. The trial court construed the term ″terminated,″ as used in the Leases, to mean ″any time the lease agreements come to an end for any reason, including expiration of the lease terms.″ The trial court declared that ″Potter had the right to purchase the sign structures and permits from [National] for the current market value of an installed fabricated structure pursuant to the [Leases] upon termination of the [Leases] for any reason, including expiration.″ Hence, the trial court concluded that, once the Leases expired on July 31, 2005, Potter had the right to purchase them under the terms specified in the Leases.

National challenges the trial court's interpretation **[*18]** of the word ″terminated″ to include expiration of the Leases. National contends that such interpretation renders paragraph four meaningless. Paragraph four permits National to remove its trade fixtures, as follows:

> 4. Ownership of Displays. All structures, displays and materials placed on the said property are [National's] trade fixtures and equipment and shall be and remain [National's] property, and may be removed by [National] *at any time prior to or within a reasonable time (not to exceed 120 days) after the* ***termination*** *of this lease,* or any extension thereof. [Potter] agrees to allow [National] full access to the property occupied by the displays for the purpose of erecting, maintaining, changing or removing the displays at any reasonable time.

National contends that the words ″terminated″ and ″termination″ are used differently in paragraphs three and four. National contends that, in paragraph three, ″terminated″ is used in the context of circumstances which effectively terminate the usefulness of the signs as an advertising medium. In paragraph four, ″termination″ means the expiration of the Leases by their own terms, as occurred herein. Hence, National contends that paragraph **[*19]** four governs and permits it to remove the signs.

Examining paragraph three and giving its terms their generally accepted meaning, it is clear that the parties intended that, in the event that a specific sign or location became useless by the occurrence of one of various specified situations, National was granted the right to immediately terminate its Lease of the specific location.

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release said leased premises upon like terms, conditions and amounts as submitted to and acceptable to Lessor by written offer of a third party.

Unlike the provision in the case at hand, the provision in *Kaplan* is first an absolute covenant to renew the Lease. Hence, there, the lessor vested in the lessee an ″option″ to renew. *See id.* at 2. An option, however, must rest on an underlying contract. *Riley v. Campeau Homes (Texas) Inc.,* 808 S.W.2d 184, 188 (Tex. App.--Houston [14th Dist.] 1991, writ dism'd). In *Kaplan,* we determined that an essential element of the contract failed because no renewal rate was stated or could be determined from the language. *Id.* at 3. Hence, we held that the provision was void. *Id.* The parties in *Kaplan* appended a right of first refusal purely with regard to setting the rental rate.

Paragraph three grants Potter the option to purchase the sign structures and permits from National, ″[i]n the event of *such cancellation.*″ (Emphasis added.)

However, paragraph three contemplates a second situation in which Potter is granted the option to purchase the signs and permits from National: ″in the event this lease is terminated for any reason *and the parties have not executed a new lease or renewal of this Lease.*″ Paragraph three also governs in the event that the Leases are terminated ″for *any* reason″ and the parties do not execute a new lease or a ″renewal.″ Use of the term ″renewal″ naturally contemplates an expiration. That the parties could have intended the circumstance in which one party prematurely terminates the Lease and then ″renews″ it is not a reasonable interpretation. Hence, the parties **[*20]** must have intended ″terminated,″ as used within the Leases, to include expiration.

Pursuant to paragraph four, the parties agreed that the billboard structures constitute trade fixtures, that they belong to National, and that they ″may be removed by [National] at any time prior to *or within a reasonable time (not to exceed 120 days) after the* ***termination*** *of this lease,* or any extension thereof.″ Having determined that the parties intended ″termination,″ as used in the Leases, to includes expiration of the lease period, then, pursuant to paragraph four, National retained the right to remove the signs upon the expiration of the Leases. This interpretation is reasonable in light of the rest of the provisions in the Leases because there is no other provision in the Leases that affords National the opportunity the remove the signs upon the expiration of the lease period. To interpret ″termination″ in paragraph four as not to include expiration of the Leases would leave National without any right to remove the billboard signs once the Leases expired.

The terms ″terminated″ and ″termination,″ as used in paragraphs three and four of the Leases, mean the same thing and include the expiration **[*21]** of the Leases on their natural terms. Because the Leases have been drafted so that each party has a right to the signs upon the expiration of the lease period, the issue becomes what the parties intended with regard to the nature and timing of those rights.

Unlike National's right to remove the signs in paragraph four, Potter's option to purchase the signs in paragraph three does not have a time limit. The issue is whether the parties intended that Potter be given the option to purchase the signs if, and only if, National does not remove them within 120 days after the Leases expire and are not renewed, or if National retains the right to remove the signs if, and only if, Potter does not exercise his option to purchase them.

HN8 In harmonizing provisions of a contract, ″terms stated earlier in an agreement must be favored over subsequent terms.″ *Coker, 650 S.W.2d at 394*. Potter's option to purchase the signs appears in paragraph three and National's right to remove the signs appears later, in paragraph four. Potter's option comes first in the agreement and therefore must be favored.

However, we also must construe a contract ″from a utilitarian standpoint bearing in mind the particular business **[*22]** activity sought to be served. . . .″ *Frost Nat'l Bank, 165 S.W.3d at 312*. Because, in paragraph three, Potter's right to purchase the signs immediately follows language concerning situations in which the signs became useless to National for a variety of stated reasons, it follows that paragraph three generally contemplates that, under such circumstances, National would allow the Leases to expire and would not renew them. Hence, it is still reasonable to construe paragraph three as first granting Potter the option to purchase the signs before National incurs the costs to remove them. Indeed, paragraph four allows, but does not require, National to remove the billboards from Potter's property if the Leases are terminated.

In addition, pursuant to paragraph three, National granted Potter an ″option″ to purchase the signs in the event that the Leases are terminated for any reason and the parties do not execute a renewal. By definition, the holder of an ″option″ has the right to compel a transfer of property. *Riley, 808 S.W.2d at 188*. As we have said, option contracts have two components: (1) an underlying contract that is not binding until accepted and (2) a covenant to hold open to the **[*23]** optionee the opportunity to accept. *See Riley, 808 S.W.2d at 187*. Here, the parties stipulated in paragraph three the means by which the purchase price of the signs would be calculated, and National promised to hold open the opportunity for Potter to purchase the signs if and when the Leases were terminated, which we have concluded includes their expiration.

We conclude that the Leases are not ambiguous and that the word ″terminate,″ as used in the Leases, includes the expiration of the lease term. Applying the same definition of ″terminate″ throughout the provisions of the Leases, paragraph four grants National the right to remove its signs within 120 days after the Leases expire. However, such right is subject to the option that National granted to Potter to first purchase the signs. Should Potter decline to exercise his option, National has the right to remove the signs.

National contends that to construe the Leases as we have operates as a forfeiture of the signs, as to National. We disagree. As the parties agreed under paragraph three, if, at

the end of the 10-year-lease term, Potter exercised his option to purchase the signs, he must pay ″the then current market value of an installed **[*24]** fabricated structure, such value to be determined by the average of three (3) bids to be obtained from three (3) major sign fabricators.″ Thus, the parties agreed that Potter would have to buy National's 10-year-old signs at the price of brand new signs, installed, at current prices. The exercise of Potter's option fully compensates National for the cost of erecting brand new signs on another property.

We overrule National's first issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley

Justice