LIABILITY FOR CATTLE LOSSES: LEASE OR AGISTMENT?

I. SUMMARY

A landowner's potential liability for dead and underweight cattle depends in the first instance whether his agreement with the owner of the livestock was a real property lease or a contract of agistment. If it's a lease, then the landowner likely is not liable for the cattle owner's losses. However, if it's a contract of agistment, then the relationship between the parties is a bailment, with the landowner obligated to tend to the cattle as an ordinarily prudent man would take care of his own animals under like circumstances.[1]

II. DISCUSSION

A. The rule of **caveat emptor** ("buyer beware") applies to **leases** of real estate. In the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety.

1. Wilcox v. Cappel, 1996 WL 706782, p.5 (Neb. App. 1996) (unpublished) (landlord not liable to tenant for cattle deaths attributable to bags of pesticide discovered on property);

2. Krance v. Faeh, 215 Neb. 242, 247, 338 N.W.2d 55, 58 (Neb. 1983) (landlord not liable to tenant for cattle deaths attributable to bags of pesticide discovered on property);

3. Van Avery v. Platte Val. Land & Inv. Co., 133 Neb. 314, 275 N.W. 288, 292 (Neb. 1937) (landlord not liable to lessee for injuries caused by discernible defect; therefore, landlord not liable to lessee's invitee);

4. Arbuckle Realty Trust v. Rosson, 180 Okla. 20, 67 P.2d 444 (1937) lessee obligated to ascertain suitability of land for grazing purposes; landlord entitled to rent, notwithstanding trespassing cattle due to lack of fencing; Oklahoma law same as Nebraska re: lack of implied warranty by landlord that demised premises will be suitable for intended purpose)

5. Duffy v. Hartsfield, 180 N.C. 151, 104 S.E. 139 (1920) (cropland lessee liable for rent in full, notwithstanding damage to crops by trespassing cattle; (in)sufficiency of fences was discernible at time of lease formation).

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[1] *See in general* Agister's Liability for Injury, Weight Loss or Death of Animals, 94 A.L.R.2d 319 (1964) (2008 Supplement).

B. Thus, in the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes the premises as he finds them.

1. Gehrke v. General Theatre Corp., 207 Neb. 301, 305, 298 N.W.2d 773, 775 (1980) (notwithstanding express duty to keep roof in good repair, landlord not liable for latent defect in original construction of roof that became apparent after execution of lease); and

2. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1980) (lessor of agricultural land does not impliedly warrant that demised premises are suitable for intended agricultural purpose; landlord not liable for loss of tenant's cattle[2] attributable to bag of Furadan discovered on premises; implied warranty of suitability applicable to residential leases not applicable to agricultural leases, citing statutory exclusion under Iowa's version of Uniform Residential Landlord and Tenant Law).

C. Damages based on poorly performing cattle have been held too speculative to recover. *See* Kunnemann v. Rogers, 1992 WL 252756, p. 4 (Neb. App. 1992) (unpublished) (cattle operator sued landlord for breach of pasture lease; loss of prospective profits too uncertain to award):

1. "When seeking to recover for the loss of prospective profits, it is clear that the evidence relied upon cannot be speculative or conjectural. In this case, the only evidence of damages offered to the district court was clearly speculative and conjectural. Starting a grazing season with 47 calves does not mean one will end the season by weaning 47 fat and healthy calves which will then sell at the desired market price. To so conclude, as did the answers to interrogatories offered by the [Lessees], is to ignore the vagaries obviously present in the cattle business. Both **cow** and calf are at risk from disease, theft, and even death. The quality and quantity of grass, which obviously affects weight gain, is certainly not fixed and is a function of variables such as weather, moisture, and previous use and care of the ground. The market price at the time of sale may be 95 cents per pound as the [Lessees] asserted, but it could be less. It is also true that these particular animals might not bring the market price. **Cattle** are not fungible, and thus whether they bring the market price is dependent upon their weight, quality, and appearance.

[2] Nebraska has the same exclusion as Iowa. *Compare* Iowa Code § 562A.5(7) with Neb. Rev. Stat. § 76-1408(7) (excluding from the Act's coverage any "[o]ccupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes").

"In summary, how many calves make it to weaning and to market, and at what weight and for what price they are sold, are essential damage predicates which are not reasonably certain because the evidence offered by the [Lessees] failed to address the variables inherent in the cattle business in a way which would make the probable outcome of these variables reasonably certain. Instead, the variables were left uncertain, and thus the amount of damages, if any, is obtained by piling assumption upon assumption. Consequently, damages here are speculative and conjectural.

" The [Lessees] claim damages of $705 for semen and supplies used to artificially inseminate the cows which were sold when the pasture was not available. However, there was absolutely no evidence offered at the hearing on the motion for summary judgment to show that the sale price obtained for these **cows** did not reflect the fact that they had already been artificially inseminated. Without such evidence as a predicate, the $705 sought by the [Lessees] would not be recoverable as a matter of law. We believe it important to observe that the prospective loss of profits in the cattle business is not always speculative and conjectural, and thus incapable of proof. However, the evidence offered on damages must rise to a level of reasonable certainty, and we only hold that the evidence offered here to resist Rogers' motion for summary judgment did not make out an issue of material fact for trial because it was obviously speculative and conjectural, as the district court found. Accordingly, we affirm the ruling by the district court on the motion for summary judgment, as well as the resulting dismissal."

C. On the other hand, damages have been allowed for poorly performing cattle in the possession of an agister. *See* Gottsch Feeding Corp. v. Red Cloud Cattle Co., 229 Neb. 746, 750-751, 29 N.W.2d 328, 331-332 (1988):

1. Given the foregoing legal realities, little purpose would be served by detailing the voluminous and conflicting evidence concerning the causes of the failure of the owner's cattle to fare as well while in the agister's care as the owner would have liked. According to some witnesses, the dry conditions, and to others the condition of some of the cows themselves, were the cause; according to still other witnesses, it was the failure of the agister to use sound and accepted drought management practices. Some witnesses attributed the diminished second-year calf crop to the owner's failure to provide enough bulls to service the herd. Suffice it to say that the record adequately supports the trial court's finding that the adult cows' weight loss was not shown to be the result of the care provided by the agister. By the same token, the record adequately

supports the trial court's findings that as a result of the agister's deficient care, the owner's first year calf crop was underweight by a total of 168,560 pounds and that as a consequence, the owner was damaged at the rate of $.675 per pound, or a total of $113,778. The record supports as well the trial court's findings that the agister's deficient care produced a second-year crop shortfall of 80 calves, as the consequence of which the owner, taking into account the savings occasioned by the shortfall, was damaged in the net amount of $156 per unborn calf, for a total of $12,480."

D. A contract for agistment is a bailment. *See* Mattern v. McCarty, 73 Neb. 228, 102 N.W. 468 (1905); 81 CJS Animals § 81. Where there is no express contract as to the kind of feed and degree of care to be provided by the agister, he is bound to provide reasonable feed and exercise reasonable care to protect the livestock from injury. Calland v. Nichols, 30 Neb. 532, 46 N.W. 631, 632 (1890). In the event of losses to the cattle, the livestock's owner must prove negligence on the agister. *Id.*

E. Needless to say, disputes arise whether an agreement is a lease or a contract of agistment**.** If the cattle's owner can show that the landowner exercised control over the cattle, such as controlling changes of pasture and routes to be taken in moving the livestock, then the cattle owner may colorably, but probably not persuasively, portray his agreement as a contract of agistment. *Compare with* Bank of Tehama v. Federal Realty Co., 2 Cal.2d 333, 40 P.2d 507 (1935) (landowner deemed agister imbued with statutory lien, where sheep owner paid a per head charge to pasture sheep on premises and performed all herding functions, but landowner's agent determined where the sheep were pastured and controlled the routes for moving the sheep); *see also* Cox v. Chase, 99 Kan. 740, 163 P. 184 (1917) (agreement construed as contract of agistment, as opposed to a lease).

F. Smurthwaite v. Painter, 755 P.2d 753, 754-755 (Utah App. 1988) is instructive. In that case, a horse owner pastured his animals on a per head basis. He exercised complete control over the animals. A bad winter occurred, causing livestock losses. The landowner was adjudged free from liability. Although not controlling precedent, the Utah Court of Appeals' analysis bears directly on the merits of a Nebraska cattle owner's potential claim:

1. "During the fall and winter of 1981-82, [Lessee] inspected his horses three to four times each week and twelve times during the 1982-83 winter season. During the spring of 1982, [Lessee]'s horses were moved to the lower pasture. There is dispute as to who moved the horses but Smurthwaite made no objection. The horses remained in the lower pasture from spring 1982 until June 1984.

> "In the fall of 1982, [Lessor] entered into agreements with others resulting in sheep, horses, and a trailer being placed on the upper pasture. While [Lessee] testified that he observed the sheep on the upper pasture, he never complained to Painter about the other livestock or his horses being on the lower pasture.
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> "The winter of 1983-84 was very severe, the first snow falling in November. [Lessee] inspected his horses on December 5, 1983, but did not inspect them again until February 4, 1984, and then only from the road. He testified he could not identify them as his horses because they were too far away. Three days later, on February 7, 1984, [Lessee] walked onto the lower pasture and found that ten of his Appaloosa broodmares with unborn foals had died from starvation. All of the horses on the upper pasture survived the 1983-84 winter.
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> "[After a bench trial]….. The trial court concluded: the agreement did not apply to any particular parcel of [Lessor's] land; no agistment agreement had been made between the parties; [Lessor] did not breach the agreement; and [Lessor] did not owe any duty of care for the livestock nor to inspect the animals nor even to report their condition under the circumstances of this case. ….[H]owever, assuming that such a duty existed and [Lessor] were found to be negligent in carrying out that duty, the Court would [nonetheless] conclude that [Lessee] in failing to inspect his stock from December 5, 1983, to February 7, 1984, was negligent himself and that said negligence was at least equal to, if not greater, than that of [Lessor]. [3]

G. On appeal, the dispositive issue was whether the agreement between the parties was a lease or a contract of agistment. The appellate court upheld the trial court's determination that the agreement was a mere lease:

1. "The record indicates that [Lessee]had total control over his horses in moving them in and out of the subject land. [Lessee] was responsible for the monthly accounting of horses to determine the rents due. Further, [Lessee] testified that he did not expect [Lessor] to feed or care for his horses. During the more than two years prior to December 1983, [Lessee] inspected, fed, and tended his horses at least two to three times a week while [Lessor] had nothing to do

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[3] Nebraska, like Utah, recognizes contributory negligence as a defense, and as an absolute defense where the plaintiff's negligence equals or exceeds that of the defendant. Fickle v. State**,** 273 Neb. 990, 735 N.W.2d 754 (2007) (citing Neb. Rev. Stat. § 25-21,185.09).

with them. There is no showing that [Lessor] had any duty to look after or care for the animals of [Lessee].

2. "We decline to take the position urged upon us by [Lessee] that any agreement for the use of pasture carries with it a duty of care on the part of the landowner. To do so would create a new species of bailment that was never intended or contemplated by the parties. For an agistment bailment to be established, there must be a showing of some duty of care bargained for and accepted by the landowner. There is no such showing in this case."

Smurthwaite v. Painter, *supra*, 755 P.2d at 755-756.

III. CONCLUSION

A cattle owner, in order to recover for damages and losses to cattle, will need to prove a contract of agistment and further establish that the landowner's negligence exceeds his own. In addition, the physical causes of the death loss and/or lack of weight gain will be at issue; so will the methodology used to assign a dollar value to the livestock losses and inadequate weight gain. Such a case is very tough to prove, especially when the landowner disclaims any obligation to tend to the animals. The most viable theory, if supported by the facts, is that a landowner assumed the duty to inspect cattle at the cattle owner's request, but breached that duty. If a cattle owner can establish that he requested inspection of the cattle, he may be able to pursue a breach of contract and/or negligence claim, based in essence on the landowner's failure to warn him of the cattle's distress.

USEFUL CASES:

Wilcox v. Cappel, 1996 WL 706782 (Neb. App. 1996)
Krance v. Faeh, 215 Neb. 242, 338 N.W.2d 55 (Neb. 1983)
Knapp v. Simmons, 345 N.W.2d 118 (Iowa 1980)
Kunnemann v. Rogers, 1992 WL 252756, p. 4 (Neb. App. 1992)
Gottsch Feeding Corp. v. Red Cloud Cattle Co., 229 Neb. 746, 29 N.W.2d 328 (1988)
Bank of Tehama v. Federal Realty Co., 2 Cal.2d 333, 40 P.2d 507 (1935)
Smurthwaite v. Painter, 755 P.2d 753 (Utah App. 1988)

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