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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1618**

Red Cross Construction, LLC,
Respondent,

vs.

Donald Brenn,
Defendant,

Martha Brenn,
Appellant.

**Filed May 21, 2018
Affirmed
Larkin, Judge**

Anoka County District Court
File No. 02-CV-17-665

Joseph A. Nilan, T. James Power, Gregerson Rosow Johnson & Nilan, Ltd., Minneapolis,
Minnesota (for respondent)

Martha C. Brenn, Coon Rapids, Minnesota (pro se appellant)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant homeowner challenges the district court's grant of summary judgment to respondent contractor on its breach-of-contract claim. Appellant contends that the district court erred by refusing to consider all of the documents that appellant submitted in opposition to summary judgment, by denying appellant's request to continue the summary-judgment hearing, by granting summary judgment, and by awarding prejudgment interest. We affirm.

FACTS

In July 2015, Donald Brenn and appellant Martha Brenn's home and garage were damaged in a hailstorm.¹ On July 21, 2015, Donald Brenn entered into a written agreement with respondent Red Cross Construction, LLC to repair the damage. The agreement provided, "Price is subject to change based on negotiations between Red Cross Construction, LLC and your Insurance Company. Any upgrades or additional work that the customer authorizes in writing, that are not approved on their Insurance Company's statement of loss, is the responsibility of the customer." The document also provided that "Customer authorizes Red Cross Construction, LLC to work directly with their Insurance Company to reach an agreed upon dollar amount for the damages caused by the storm." Lastly, the agreement provided:

By signing this agreement the homeowner authorizes Red Cross Construction, LLC to act on their behalf with the

¹ Our statement of facts is based on the district court's recitation of the undisputed facts in the underlying summary-judgment record.

Insurance Company to reach a price agreeable to the Insurance Company and Red Cross Construction, LLC with no additional cost to the homeowner except for the deductible. When the price is agreed upon and determined it shall then become the final price.

The Brenns' insurance company, State Farm Insurance, initially estimated the cost of the storm damage to be \$11,309.46. In September 2015, State Farm issued a revised estimate of \$14,778.34. The Brenns and respondent executed a change order on October 15, 2015, providing for the replacement of the roof and siding on the Brenns' house and the roof on the garage for the price of \$14,778.34. The Brenns submitted a \$14,778.34 down payment to respondent for the repairs.

On November 24, 2015, the parties executed a change order modifying the roof and siding colors. On March 15, 2016, the parties executed a change order modifying the siding and roofing materials and setting forth a new price of \$25,374.74. On March 31, 2016, the parties executed a change order modifying the color of the roof and brand of the siding and setting forth a new price of \$27,219.45. On April 12, 2016, the parties executed a change order modifying the color, brand, and style of siding. Respondent began replacing the roof and siding on the Brenns' house and the roof on their garage in April 2016.

In May 2016, State Farm issued a revised estimate of \$33,070.36. On June 7, appellant requested an appraisal of the loss under the terms of the policy. Also on June 7, 2016, the Brenns executed a written agreement with respondent for the replacement of the front, right, and rear siding of their garage, as well as for other miscellaneous repairs and upgrades to the house and garage. Those repairs and upgrades were outside the scope of the Brenns' insurance claim with State Farm. Under the terms of the June 7 agreement,

the Brenns agreed to pay \$1,800 for the repairs and upgrades covered by that agreement and respondent agreed that if the appraisal of the covered loss was greater than \$41,000, the Brenns would pay only \$900 for the repairs and upgrades in the June 7, 2016 agreement.

By mid-July 2016, respondent had replaced the roof and siding on the Brenns' house, the roof on their garage, and the siding on the front, right, and rear sides of the garage. On August 8, an appraisal panel unanimously agreed that the cost to repair the insured loss was \$41,027.42. Respondent prepared a final change order, a conditional waiver of lien, and a certification of completion of repairs. The final change order provided that the price for repairing the storm damage to the Brenns' house and the roof on the garage was \$41,027.42. The certification of completion of repairs stated that the Brenns "certify that all work related to the following project: Re Roof house and Garage, re side house, new gutters, new soffit and fascia, Proper flashing, caulking, EPA Lead Safety, and proper electrical per MN building Code" at the Brenns' residence "has been completed in a workman-like manner and to my/our satisfaction." The Brenns signed the final change order, conditional waiver of lien, and certification of completion of repairs, which were all dated August 8, 2016.

On September 6, the Brenns sent respondent a letter, asserting that respondent overcharged them and that they owed respondent only \$17,885. And on September 9, appellant emailed respondent, claiming that the Brenns owed respondent only \$12,441. On October 17, the Brenns sent respondent another letter, this time claiming that they owed respondent only \$5,174 or \$9,164, depending on whether respondent was entitled to overhead and profits. On October 21, the Brenns sent a document labeled "Termination of

Contract” to respondent, which alleged that respondent failed to complete the repairs and had damaged interior window moldings.

In January 2017, respondent sued the Brenns, asserting breach-of-contract, promissory-estoppel, and unjust-enrichment claims. Respondent alleged that the Brenns had failed to pay the remaining \$27,149.08 owed to respondent “on the Roof and Siding Contract and the Garage Siding Contract.” On March 27, respondent moved for summary judgment and requested a hearing date of May 23, 2017. On April 25, respondent filed its memorandum of law and documents supporting its summary-judgment motion. The district court rescheduled the motion hearing to June 20, 2017, as a result of the assigned district court judge’s unexpected medical leave. On May 2 and 23, the Brenns sent letters directly to the assigned district court judge regarding the case. On May 25, the district court judge’s law clerk returned the letters to the Brenns and instructed them to address future mailings to court administration.

On June 15, the Brenns requested a three-to-four-week continuance of the summary-judgment hearing to allow them to hire a lawyer and complete an inspection. The district court, believing that respondent knew of this continuance request, granted the request and rescheduled the summary-judgment hearing for September 1, 2017. Respondent contacted court administration and opposed a continuance of that length. The district court rescheduled the summary-judgment hearing to August 8.

On July 21, the Brenns requested a continuance until September 1, asserting “that both Donald [Brenn] and [appellant had] been very ill,” that “[appellant] broke out with shingles two or three weeks ago, [and appellant’s] doctor requested rest for a while” and

that Donald Brenn had been admitted to a hospital for “heart failure/pneumonia” and would “be going home for a week or two or maybe longer if he needed it.” The Brenns further asserted that they believed they would not be able to attend the summary-judgment hearing on August 8 because of these health concerns. The district court denied the Brenns’ continuance request.

On August 4, the Brenns submitted a packet of documents to the district court. On August 7, the Brenns submitted a letter, a two-page memorandum, and a copy of a mechanic’s lien to the district court. In the two-page memorandum, the Brenns argued that respondent required them to engage in unnecessary arbitration, failed to complete the repairs, fraudulently misrepresented their general contractor status, and increased the price of the roofing and siding work without their consent. On August 8, the district court held a summary-judgment hearing, at which the Brenns and Michael Hughes, one of respondent’s owners were present. Respondent was represented by counsel, and the Brenns appeared pro se. During the hearing, the district court informed the parties that it would not consider the packet of documents the Brenns submitted on August 4 because it was untimely and had not been served on respondent, that it would not consider the letter or the copy of the mechanic’s lien the Brenns submitted on August 7 because they were not served on respondent, and that the only submission from the Brenns that it would consider was the two-page memorandum.

The district court granted summary judgment for respondent, reasoning that the Brenns’ assertions in their two-page memorandum opposing summary judgement were not supported by the record and that the record established that the Brenns breached their

contracts with respondent by failing to pay the outstanding balance of \$27,149.08.² The district court awarded damages in that amount, plus prejudgment interest, and it entered judgment of \$28,713.57 for respondent. The district court directed that the Brenns' insurance proceeds, which were being held in the Brenns' mortgage escrow account, be released to respondent.

The Brenns appealed. On January 19, 2018, while this appeal was pending, Donald Brenn died. On March 15, 2018, this court issued an order directing the clerk of appellate courts to modify the case caption to reflect that Martha Brenn is the only appellant in this appeal. The order also granted a motion by respondent to strike certain exhibits and references thereto in appellant's brief.

D E C I S I O N

Before addressing appellant's specific assertions of error, we note several principles that govern this court's review. First, "[a] reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Although some accommodations may be made for pro se litigants, they are generally held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Thus, an appellant who was not represented by counsel in the district court must still properly preserve issues for review.

² The district court calculated this remaining balance by adding the contract price based on the appraisal, \$41,027.42, to the price for the June 7, 2016 contract, \$900, and subtracting the \$14,778.34 that appellant had already paid respondent.

Second, the record on appeal consists of “[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any.” Minn. R. Civ. App. P. 110.01. “It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). The appellate record here consists of the documents respondent submitted in the district court in support of summary judgment and appellant’s two-page memorandum opposing summary judgment. Although appellant relies on a number of other documents in the addendum to her brief, this court granted respondent’s motion to strike those documents, and we therefore do not consider them.

Third, “on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it.” *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quotation omitted).

Many of appellant’s claims of error are unsupported by the appellate record. We limit our review to the issues that can be decided on the record before us.

I.

Appellant contends that the district court erred by refusing to consider all of the documents that she submitted prior to the August 8, 2017 summary-judgment hearing. Specifically, appellant submitted an “Answer and Counter-Claim,” “Responsive Notice of Motion and Motion,” and accompanying exhibits. Appellant included an affidavit of service confirming that the documents were mailed to the district court, but she did not

include an affidavit verifying service of the documents on respondent. Later, appellant submitted a letter, a two-page memorandum, and a copy of a mechanic's lien to the district court.

At the summary-judgment hearing, counsel for respondent confirmed receipt of the two-page memorandum, but stated that he had not received any of the other documents. The district court ruled that it would not consider the first set of documents because they were untimely and had not been served on respondent. As to the second set of documents, the district court ruled that it would not consider the letter or copy of the mechanic's lien because they were not served on respondent. Thus, the only submission that the district court considered from appellant was the two-page memorandum.

The party responding to a dispositive motion "shall serve the following documents on all opposing counsel . . . and shall file the documents with the Court Administrator at least 9 days prior to the hearing: (1) Memorandum of law; and (2) Supplementary affidavits and exhibits." Minn. R. Gen. Pract. 115.03(b). "For a dispositive motion, the court, in its discretion, may refuse to permit oral argument by the party not filing the required documents, may allow reasonable attorney's fees, or may take other appropriate action." Minn. R. Gen. Pract. 115.06.

Because a summary-judgment motion is a dispositive motion, appellant was required to file her responsive memorandum of law and supporting exhibits at least nine days before the August 8, 2017 summary-judgment hearing. Appellant filed the first set of documents on August 4 and the letter, two-page memorandum, and copy of the mechanic's lien on August 7. Thus, those documents were not timely filed under Minn. R.

Gen. Pract. 115.03(b). Likewise, appellant failed to serve her first set of documents and the letter and copy of the mechanic's lien on opposing counsel as required by the same rule. The district court had discretion to take appropriate action based on appellant's failure to properly file and serve the required documents and did not abuse its discretion by refusing to consider the documents as a sanction for appellant's failure to comply with filing and service requirements.

II.

Appellant contends that the district court erred by denying her July 21, 2017 request for a continuance of the summary-judgment hearing to September 1, 2017. Appellant notes that "Donald [Brenn] was hospitalized on 7/8/2017 with heart failure and [she] broke out with shingles caused by stress." Appellant argues that she was prejudiced by the district court's denial of her continuance request because it prevented her from properly filing supporting documents in district court.

"The granting of a continuance is within the discretion of the [district] court and its ruling will not be reversed absent a clear abuse of that discretion." *Chahla v. City of St. Paul*, 507 N.W.2d 29, 31 (Minn. App. 1993), *review denied* (Minn. Dec. 14, 1993). The test is whether a denial prejudices the outcome of the proceeding. *Id.* at 32. The district court should base its decision whether to grant a continuance "on the facts and circumstances surrounding the request." *Hamilton v. Hamilton*, 396 N.W.2d 91, 94 (Minn. App. 1986). "Ordinarily, medical incapacity is grounds for a continuance." *Chahla*, 507 N.W.2d at 32.

We are not persuaded that the district court's denial of appellant's continuance request prejudiced her by preventing her from properly filing supporting documents prior to the summary-judgment hearing. On March 27, 2017, respondent notified appellant that the summary-judgment hearing would occur on May 23. On April 25, respondent filed its memorandum of law and documents supporting its motion. Under the general rules of practice, appellant had until May 15 to file and serve responsive documents. *See* Minn. R. Gen. Pract. 115.03(b) (stating that a party responding to a dispositive motion shall serve and file responsive documents "at least 9 days prior to the hearing"); Minn. R. Gen. Pract. 354.01 (extending time period to next day where last day of time period is a Sunday). As a result of the continuances of the summary-judgment hearing to June 20 and August 8, appellant had more than two additional months to respond to respondent's summary-judgment motion. Thus, appellant was not prejudiced and the district court did not abuse its discretion by denying another continuance.

III.

Appellant contends that the district court erred by awarding respondent summary judgment on its breach-of-contract claim.

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative

with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). “[T]he party resisting summary judgment must do more than rest on mere averments.” *Id.* at 71. If reasonable minds might draw different conclusions from the evidence presented, summary judgment is inappropriate. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015).

This court reviews a district court's grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). “We view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law.” *Id.*

“A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). “In order to state a claim for breach of contract, the plaintiff must show (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).

Formation of Contract

“The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008) (quotation omitted), *review*

denied (Minn. Jan. 20, 2009). The offer and acceptance requirements of contract formation are satisfied if there is a “meeting of the minds concerning a contract’s essential elements.” *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011).

As support for its request for summary judgment, respondent submitted the July 21, 2015 written agreement regarding respondent’s repair of the July 2015 insured storm damage to the Brenns’ home and garage, as well as the October 15, 2015, November 24, 2015, March 15, 2016, March 31, 2016, April 12, 2016, and August 8, 2016 change orders regarding the agreement. Respondent also submitted the June 7, 2016 written agreement for additional uninsured repairs and upgrades to the Brenns’ home and garage.

Appellant argues that “[t]he only valid contract was the revised contract signed on 4/[20]16 for \$27,219.45” and that “[t]he 7/2015 document is not a valid contract” under Minn. Stat. § 326B.809 (2016). That statute provides that all residential remodeling and roofing agreements “including proposals, estimates, bids, quotations, contracts, purchase orders, and change orders between a licensee and a customer for the performance of a licensee’s services must be in writing” and “contain (1) a detailed summary of the services to be performed; (2) a description of the specific materials to be used or a list of standard features to be included; and (3) the total contract price or a description of the basis on which the price will be calculated.” Minn. Stat. § 326B.809(a); *see* Minn. Stat. § 326B.801 (2016) (providing that the requirements of Minn. Stat. § 326B.809 apply to “residential contractors, residential remodelers, residential roofers, and manufactured home installers”).

The relevance of appellant's argument under Minn. Stat. § 326B.809 is not clear. Appellant concedes that a contract was formed; her challenge is to the final contract price. Appellant does not explain how her challenge to the June 21, 2015 document under section 326B.809 impacts that final-price determination.

Moreover, in the summary-judgment proceeding in district court, appellant did not argue that the July 21, 2015 agreement failed to meet the requirements of Minn. Stat. § 326B.809. The district court therefore did not consider or decide that issue. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele*, 425 N.W.2d at 582 (quotation omitted). Because appellant did not raise application of section 326B.809 in district court, we do not consider its application on appeal.

Appellant also argues that she did not agree to pay the \$41,027.42 price set forth in the August 8, 2016 final change order. Specifically, she asserts that she did not sign the final change order, the certificate of completion, or the conditional waiver of lien and that they are "fake documents."

There is insufficient evidence in the record to raise a genuine issue of material fact regarding the validity of appellant's signature on those documents or to suggest that the documents are otherwise not genuine. For example, appellant did not submit an affidavit attesting under oath that her signature was forged. Appellant's unsworn and unsupported assertions regarding the validity of her signature on the relevant documents are mere averments that do not create a genuine issue of material fact. See *DLH*, 566 N.W.2d at 71 ("[T]he party resisting summary judgment must do more than rest on mere averments.").

On this record, there is no genuine issue of material fact regarding the formation of contracts requiring appellant to pay respondent \$41,927.42 for the insured and uninsured repairs and upgrades to appellant's home and garage.³

Performance by Respondent

In support of its request for summary judgment, respondent submitted a certification of completion of repairs, which states that appellant "certif[ies] that all work related to the following project: Re Roof house and Garage, re side house, new gutters, new soffit and fascia, Proper flashing, caulking, EPA Lead Safety, and proper electrical per MN building Code" at the residence "has been completed in a workman-like manner and to my/our satisfaction." Respondent also submitted Hughes's affidavit into evidence, which states that respondent completed the work required under the garage siding contract.

Appellant argues that respondent failed to complete the agreed-upon work. Appellant's unsworn and unsupported assertions that she did not actually sign the certification of completion of repairs and that respondent failed to complete the work described in the certification of completion and the Hughes affidavit are insufficient to establish a genuine issue of material fact regarding performance by respondent. *See DLH*, 566 N.W.2d at 71 ("[T]he party resisting summary judgment must do more than rest on mere averments.").

³ Appellant does not appear to dispute that the June 7, 2016 agreement for other repairs and upgrades is a contract or the terms of that agreement.

Breach by Appellant

“A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs.*, 848 N.W.2d at 543. The record establishes that appellant has paid respondent only \$14,778.34 even though appellant was obligated to pay \$41,927.42 under the parties’ contracts. Appellant’s failure to pay the remaining \$27,149.08 due under the contracts is a breach.

Because there are no genuine issues of material fact regarding respondent’s breach-of-contract claim, the district court appropriately granted summary judgment on this claim.

IV.

Appellant contends that the district court erred by awarding respondent prejudgment interest because “it is very clear to everyone [respondent] abandon[ed] the project unfinished, [and] delay[ed] this project because they were playing stupid and dangerous games.” Appellant’s assertion appears to be another challenge to the merits of respondent’s breach-of-contract claim, which we rejected in the last section of this opinion. Moreover, appellant does not offer legal authority or argument to support the assertion. “An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.” *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (quotation omitted), *aff’d*, 728 N.W.2d 243 (Minn. 2007). We have reviewed the district court’s award of prejudgment interest, and we do not discern obvious prejudicial error justifying reversal. We therefore affirm the district court’s award of summary judgment in its entirety.

Affirmed.