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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1388**

McKraut Holdings, LLC,
Respondent,

vs.

Cynthia Tomenes, et al.,
Appellants.

**Filed April 29, 2019
Affirmed
Rodenberg, Judge**

McLeod County District Court
File No. 43-CV-18-1045

Scott L. Nokes, Glencoe Law Office, Glencoe, Minnesota (for respondent)

John G. Westrick, Savage Westrick, P.L.L.P., Bloomington, Minnesota (for appellants)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and
Stauber, Judge.*

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellants appeal from the district court's judgment in favor of respondent in this
eviction action, arguing that the district court erroneously (1) declined to apply res judicata

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

based on the earlier dismissal of a similar action, (2) concluded that respondent had not waived its right to evict appellants by accepting rent, (3) found that an unauthorized person lived in the leased premises for more than ten days, and (4) found endangerment or substantial annoyance under Minn. Stat. § 327C.09, subd. 5 (2018). We affirm.

FACTS

Appellants signed a lease with respondent McKraut Holdings LLC, the park landlord, to rent Lot 146 in the McDonald Mobile Home Park (park) in Hutchinson effective July 1, 2011. The lease prohibits assigning, subletting, or renting the premises without the prior written consent of the park, and further provides that any adult who stays at a park unit for more than 10 nights in any 30-day period must apply to become a resident. The lease also provides for eviction if a resident does “something in the mobile home park which seriously annoys or endangers the health or safety of other park residents.”

On February 21, 2018, Officer Willers of the Hutchinson Police Department was informed of an active felony warrant for F.W. Officer Willers searched the state motor-vehicle database, which showed F.W.’s address to be Lot 146 at the street address of the park. The database also showed a 2003 red Ford Taurus, license plate 06***A, registered to F.W. at that same address. Officer Willers drove to the park and observed a red Ford Taurus with license plate 06***A outside the mobile home at Lot 146. Officer Willers called for assistance in serving the warrant. Two officers knocked on the door and asked the woman who answered the door if F.W. was home. The woman said “yes” and called for F.W., who was there. F.W. was then arrested.

C.R., the park's property manager, noticed police at the park on February 21. Consistent with her normal routine, she waited a few days to contact the police department to obtain a report concerning their presence at the park. After viewing the police report and consulting with neighbors, appellants, and the park owner, C.R. decided to evict appellants based on both the crime-free addendum in the lease and appellants having allowed someone who had not been approved by the park to live in their home for more than ten days. C.R. later testified that one of the appellants expressed remorse for having allowed F.W. to live with them, while the other said that F.W. had only been there for nine days.

On March 6, 2018, respondent provided appellants with notice to vacate. This allowed appellants 60 days to vacate the property. Respondent then accepted full rent payments from appellants for March, April, and May 2018. Respondent filed a complaint for eviction on April 6, 2018. The district court granted appellants' motion for summary judgment, concluding that respondent's acceptance of the rental payments waived the notice to vacate. The district court made "no findings whether [appellants] violated the lease."

Respondent provided appellants with another notice to vacate on May 18, 2018, citing the arrest of F.W. at their leased property and appellants having allowed F.W. to live in their home for more than ten days without park approval as reasons for the notice. The notice to vacate provided appellants with 30 days to vacate pursuant to Minn. Stat. § 327C.09, subd. 5 (2018). Appellants did not vacate. Respondent filed a second eviction action on June 27, 2018. Appellants asserted the defenses of waiver by reason of

respondent's acceptance of rent checks and res judicata. The district court denied appellants' motion for summary judgment. The case was tried to the court.

The district court determined after trial that respondent met its burden of proof that appellants substantially endangered other park residents when they allowed F.W. to stay at their property. It also found that, by failing to follow paragraph 13 of the lease, appellants placed other park residents in significant danger.¹ It also determined that respondents were not estopped or precluded from evicting appellants because, in the earlier action, respondents had not been provided a full and fair opportunity to litigate the issue of whether appellants breached the lease. The district court concluded that appellants' breach of the lease endangered other residents and park personnel, thereby satisfying Minn. Stat. § 327C.09, subd. 5.² It entered judgment in favor of respondents.

This appeal followed.

¹ Paragraph 13 of the lease provides:

Resident shall not assign this Lease, sublet or rent the Premises or any portion thereof or transfer possessions or occupancy thereof to any other person without the prior written consent of Park. Written consent will only be considered after completing the application process. The resident does not have to inform the Park of overnight visitors who stay less than ten (10) consecutive nights or ten (10) nights in any thirty (30) day period. But if any adult comes to live or stay longer than stated above with the resident after this lease is signed, or if any minor children of the resident become an adult (turn 18), the resident must have the adult apply to become a resident and to sign this lease.

² A resident of a manufactured home lot may be evicted where the resident "acts in the park in a manner which endangers other residents or park personnel . . . and has received 30 days' written notice to vacate." Minn. Stat. § 327C.09, subd. 5.

DECISION

Appellants argue that the district court erred when it found that the issue of waiver was not barred by res judicata. Appellate courts review the application of res judicata de novo. *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011). Res judicata applies as an absolute bar to a subsequent claim when the earlier claim: (1) involved the same set of factual circumstances; (2) involved the same parties or their privies; (3) had a final judgment on the merits; and (4) provided the party to be estopped a full and fair opportunity to litigate the matter. *Id.* All four elements must be met for res judicata to apply. *Id.*

Appellants cite *Wurdemann v. Hjelm*, for the proposition that the judgment in the first action bars a second action where the factual basis is the same. 102 N.W.2d 811 (Minn. 1960), *cert. denied*, 364 U.S. 894 (1960). In *Wurdemann*, the supreme court explained that the determination in the first action that the lease had been breached and that the breaches had not been waived by the lessor were conclusive, and any challenge to those determinations was required to have been made on appeal. *Id.* at 820. The supreme court held that the “judgment in favor of the landlord in an unlawful detainer action is conclusive between the parties as to the existence and validity of the lease, the occupation of the tenant, and the facts alleged in the complaint which forms the basis of the action.” *Id.* at 813.

Here, the earlier claim arose from the same set of factual circumstances and involves identical parties. But the district court in the first action made no final judgment on the merits. The district court expressly refrained from making findings concerning whether the lease was breached. The district court concluded only that respondent waived the notice to vacate under Minn. Stat. § 327C.11, subd. 2 (2018), by accepting the rental payment for

the month of May 2018. Accordingly, the district court in that action never resolved questions concerning whether appellants breached the lease or whether other statutory grounds for eviction had been satisfied. We see no error in the district court's determination that this action is not barred by res judicata because the earlier dismissal on procedural grounds did not amount to a final judgment on the merits after a full and fair opportunity to litigate.

Appellants also argue that the district court erred in determining that respondent's acceptance of rent checks only waived the initial notice to vacate.

As a general rule, a landlord waives the right to evict for breach of lease by accepting rent with knowledge of the breach. *See Westminster Corp. v. Anderson*, 536 N.W.2d 340, 341 (Minn. App. 1995) (stating that the general rule in Minnesota is that a landlord who subsequently accepts rent from a tenant waives his right to rely on any known prior material breach of the lease as a basis for an unlawful detainer action against the tenant), *review denied* (Minn. Oct. 27, 1995). A lessor's acceptance of rent operates as an election to continue the lease. *Priordale Mall Inv'rs v. Farrington*, 411 N.W.2d 582, 584 (Minn. App. 1987). But subsequent lease violations are not waived, and a lessor may bring an action based on continuing breaches. *Id.* An exception to this general rule is where an express clause in the lease provides that acceptance of rent does not constitute a waiver of the existing or any preceding breach. *Id.* at 585. And even in the absence of such a clause, the lessor must by acceptance of the rent manifest some intent to waive the notice of termination. *Minneapolis Cmty. Dev. Agency v. Powell*, 352 N.W.2d 532, 534 (Minn. App. 1984) (explaining that it would be inequitable to hold that once a tenant has breached a

lease provision and the lessor has served a termination notice, the lessor must act quickly to evict her or forever lose its right to do so).

In *Priordale*, the lessor accepted rent after knowing of the prior breaches and knowing that one of the lessee's defenses to the eviction action was waiver; we determined that the lessor waived its right to assert past breaches of the lease. 411 N.W.2d at 585. In *Powell*, we held that the lessor did not waive its right to collect rent when the lessor accepted rent for eight months following the lessee's receipt of a termination notice, and when the lessor accepted rent even after it commenced the eviction action. 352 N.W.2d at 535.

Appellants cite *Lea v. Pieper* to argue that respondent's acceptance of rent waived the alleged violation. 345 N.W.2d 267 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). *Lea* determined that the lessor could not terminate the lease under Minn. Stat. § 327C.09, subd. 5, because the lessees did not receive 30 days' notice to vacate. *Id.* at 271. It also concluded that the lessor waived a June 16 notice to vacate by accepting rent on July 1, because the expiration of the notice to vacate was July 19. *Id.* We addressed the lessor's argument that it would be inconvenient for a park owner to prorate rent where a notice to vacate specified a date within a rental period, finding it "unpersuasive in this day of inexpensive electronic calculators." *Id.* We held only that the "notice to vacate" was waived by accepting rent for a time period after the notice to vacate expired. *Id.*

Here, C.R. testified that she accepted appellants' checks for March, April, and May. The first notice was given on March 6, and provided 60 days to vacate, which was May 5. Respondent could accept payment for the period of time in which appellants continued to

occupy the premises before termination of the lease, but accepting payment for all of May—not prorated to May 5—amounted to waiver of the notice given on March 6. *Id.*

“Acceptance of rent for a period after the expiration of a final notice to quit waives *that notice* unless the parties agree in writing after service of the notice that the notice continues in effect.” Minn. Stat. § 327C.11, subd. 2 (emphasis added); *see also Arcade Inv. Co. v. Gieriet*, 109 N.W. 250, 250 (Minn. 1906) (explaining that if a landlord provides a second notice, he waives the right to proceed under the first notice). Accordingly, respondent’s acceptance of May rent waived the *notice*, but did not necessarily waive the underlying breach.

Appellants argue that the waiver rule’s purpose is to instill a repose in the tenant by reaffirming the lease between the parties through the landlord’s acceptance of rent. The district court implicitly found that respondent did not intend to waive the breach by accepting rent payments after respondent had served a notice to vacate and while an eviction action was still pending. The record supports the finding that respondent did not waive the underlying breach by accepting May rent.

Appellants argue that the district court erred by finding that F.W. lived at appellants’ home for more than 10 days in a 30-day period. We review a district court’s factual findings for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). A finding of fact is clearly erroneous when we are left with the definite and firm conviction that a mistake has been made. *Id.* “If there is reasonable evidence to support the [district] court’s findings of fact, a reviewing court should not disturb those findings.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

There is ample evidence in the record to support the district court's finding that F.W. was living at appellants' home and had been there for more than ten days. F.W. listed appellants' address as his home address, registered his car at that address, and provided that address to his probation officer. One of the appellants replied in the affirmative when officers asked if F.W. was "home," on February 21, 2018. And one of appellants expressed remorse to C.R. about having allowed F.W. to live at Lot 146. Although there is contrary evidence in the record, the district court believed respondent's witnesses on these disputed fact questions. Its finding that F.W. was living at appellant's home is not clearly erroneous.

Appellants also argue that, even if the district court's finding that appellant lived at Lot 146 for more than 10 days is not erroneous, they were entitled to a 30-day notice to cure. If respondent had sought to evict appellants exclusively on the basis of violating the lease or a park rule, appellants would be entitled to 30 days to comply with the rule after receiving written notice of the alleged noncompliance. Minn. Stat. § 327C.09, subd. 4 (2018). But notice to cure is not required to evict a resident who endangers other park residents or park personnel under Minn. Stat. § 327C.09, subd. 5, the statutory provision which provided grounds for eviction here. Actions endangering other park residents, causing a substantial annoyance, or causing substantial damage to the park premises are treated differently than actions violating what may be more trivial rules found in a standard lease.

Appellants argue that the district court abused its discretion by determining that F.W. living with appellants endangered other park residents. "When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district

court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.” *In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015) (quotation omitted).

A park owner may recover possession of land upon which a manufactured home is situated only for a reason specified in Minnesota Statutes sections 327C.09 or 327C.095 (2018). As discussed, a resident of a mobile home park may be evicted if the resident “acts in the park in a manner which endangers other residents or park personnel, causes substantial damage to the park premises or substantially annoys other residents, and has received 30 days’ written notice to vacate.” Minn. Stat. § 327C.09, subd. 5. “A park owner seeking to evict pursuant to this subdivision need not produce evidence of a criminal conviction, even if the alleged misconduct constitutes a criminal offense.” *Id.*

There is evidence in the record to fairly support the district court’s determination that appellants’ allowing F.W. to live at their residence endangered others at the park. F.W. was on warrant status for charges of felony third-degree assault, felony domestic assault by strangulation, and domestic assault. The district court found that F.W. was arrested and subsequently convicted of felony assault by strangulation. The district court found as fact that F.W. would not be allowed to live in the park based on standards in the applications process (no felonies within three years) because of respondent’s desire to maintain a safe mobile home park for the benefit of its residents. The district court found endangerment, the record supports that finding, and appellants were not entitled to a 30-day notice to cure

on these facts. The district court did not abuse its discretion in determining that appellants endangered other residents.³

Affirmed.

³ Appellants cite an Alaska decision, and two unpublished cases of this court in support of their assertion that allowing a dangerous person on the premises is not sufficient to constitute endangerment of other residents. Not only are the cases cited by appellants distinguishable, the unpublished opinions are not binding. Minn. Stat. § 480A.08, subd. 3 (2018). Appellants have not met their burden of demonstrating error on appeal. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944) (“[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.”).