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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0333**

Athena 2004, LLC,
Respondent,

vs.

LC Rochester, Inc., et al.,
Appellants.

**Filed February 1, 2021
Reversed and remanded
Connolly, Judge**

Olmsted County District Court
File No. 55-CV-18-3303

Daniel J. Heuel, O'Brien & Wolf, LLP, Rochester, Minnesota (for respondent)

Ken D. Schueler, John T. Giesen, Dunlap & Seeger, P.A., Rochester, Minnesota (for appellants)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal following a court trial in this breach-of-contract action arising from an agreement to construct and lease a restaurant building, appellant-tenant argues that the

district court erred in applying the disproportionate-forfeiture exception to excuse a condition precedent contained in the lease agreement. By notice of related appeal, respondent-landlord argues that the district court's award of attorney fees was erroneous. Because the district court improperly applied the disproportionate-forfeiture exception, we reverse and remand.

FACTS

Appellant LC Rochester, Inc. is a corporation that owns and operates Little Caesars pizza franchises in Rochester, Minnesota, and Mason City, Iowa. Appellant Tom Gommels is the president and a majority shareholder of LC Rochester, and appellant Nathan Aaland is a minority shareholder. Respondent Athena 2004 is the owner of Eastwood Plaza, a commercial shopping center located in Rochester.

Because Gommels desired to open a second Little Caesars in Rochester, LC Rochester and Athena 2004 entered into a lease agreement (the lease) on June 18, 2014, whereby LC Rochester agreed to lease a new stand-alone building to be constructed in the Eastwood Plaza parking lot. Under the terms of the lease, Athena 2004 was required to "Substantially Complete all of Landlord's Work, on or before September 1, 2014." Exhibit C to the lease provided the following list of items that consisted of "Landlord's Work": (A) "[n]ewly constructed building detached from the existing Shopping Center"; (B) restrooms "equipped with a lavatory, toilet, mirror, soap-dispenser, towel-dispenser, paper-dispenser, and flooring and wall materials"; (C) "400 amp, 3-phase, 208/240 volt, 4-wire electrical service to the rear of the Premises to include all panels and circuit breakers"; (D) gas line to the oven location; (E) HVAC system that is warranted by Athena 2004 for one year; (F) "T-bar ceiling system

with tile and lay-in light fixtures”; (G) underground plumbing system; (H) flooring for the premises; (I) water heater; (J) grease trap; (K) “[c]onduit for telephone and exterior signage”; (L) insulation of exterior walls and roof; and (M) glass in windows and doors. The lease also provided that the “Premises shall not be considered ‘Substantially Complete’ until” LC Rochester “obtained a certificate of occupancy (or local equivalent) with respect to Landlord’s Work for the Premises.” (Emphasis omitted.) The lease further provided that LC Rochester would receive two days’ rent as liquidated damages for each day that substantial completion of Athena 2004’s work extended beyond September 15, 2014. Finally, the lease stated that LC Rochester was entitled to deduct any accrued liquidated damages against all rent coming due under the lease.

It is undisputed that Athena 2004 failed to substantially complete its work by the September 1, 2014, deadline set forth in the lease. In light of the delay of the construction project, the parties entered into an addendum to the lease (the addendum) on October 10, 2016. The addendum acknowledged that Athena 2004 missed the deadline to substantially complete its work, but stated that Athena 2004 intended to substantially complete its work by December 1, 2016. The addendum also stated that if, Athena 2004 substantially completed its work by the new deadline of December 1, 2016, LC Rochester would “waive its right to enforce the Liquidated Damages Clause” in the lease. Finally, the addendum provided:

The amendments to the Lease . . . are contingent upon [Athena 2004’s] Work being Substantially Completed by [December 1, 2016]. In the event [Athena 2004] fails to Substantially Complete [its] Work by [December 1, 2016], (i) each of the amendments to the Lease . . . shall be considered void *ab initio*, and (ii) [LC Rochester’s] right to enforce the Liquidated Damages Clause shall be deemed fully restored.

The parties disputed whether Athena 2004 substantially completed its work by December 1, 2016. But LC Rochester was able to open for business on January 17, 2017. In April 2018, Athena 2004 brought this action against LC Rochester for unpaid rent. LC Rochester counterclaimed, alleging that Athena 2004 breached the “Lease and Addendum” by failing to substantially complete its work by December 1, 2016. LC Rochester also sought liquidated damages under the lease. Both parties sought attorney fees under the lease.

At trial, evidence was presented that the following work was not substantially completed by December 1, 2016: (1) restrooms; (2) 400 amp, 3-phase, 208/240 volt, 4-wire electrical service at the rear of the premises, including all panels and circuit breakers; (3) gas line; (4) HVAC system warrantied by Athena 2004 for one year; (5) T-bar ceiling with tile and lay-in light fixtures; (6) underground plumbing system; (7) flooring; and (8) insulation of exterior walls and roof. In addition, evidence was presented that the building has not been approved by Rochester Building and Safety. Although evidence was presented that LC Rochester eventually undertook some of Athena 2004’s responsibilities in completing “Landlord’s Work,” Gommels testified that he did not intentionally delay completion of the work he undertook in order to invoke the liquidated damages clause of the lease.

The district court determined that Athena 2004 “breached the addendum . . . by failing to substantially complete the ‘Landlord’s Work’ by December 1, 2016.” In making this finding, the district court credited Gommels’s testimony, and found “no merit” to Athena 2004’s argument of intentional delay. The district court found that “Gommels should not have needed to take on any of ‘Landlord’s Work,’” and that the “evidence supports that had he not done so, the project would have been even more delayed.” But the district court

determined that the breach “was not material,” because the “majority of construction work was completed by or within a few weeks of the December 1, 2016 deadline,” and “LC Rochester was able to open [its] restaurant relatively close to the timeframe it sought, which was the first week of January 2017.” As such, the district court found that the “addendum to [the] lease controls.” The district court then determined that LC Rochester is “entitled to damages from the anticipated delay of opening—the first week of January 2017, to the date of opening—January 17, 2017,” as well as “damages for charges incurred in completing ‘Landlord’s Work.’” The district court also determined that LC Rochester “breached the addendum to [the] lease by failing to pay rent” and, therefore, Athena 2004 is “entitled to damages for nonpayment of rent from January 2017 to November 2018.” The district court concluded that because the “evidence in the record is insufficient on the issue of damages,” further proceedings were required on the issue of damages.

Following a hearing on the issue of damages, the district court awarded Athena 2004 \$44,064.85 for nonpayment of rent and additional fees and expenses. The district court also awarded damages to LC Rochester in the amount of \$5,421.13 for “buildout expenses” and lost profits. Finally, the district court stated that it would address the parties’ requests for attorney fees after they move “for relief in accordance with Minn. R. Gen. Prac. 119.”

Both parties moved for an award of attorney fees and costs, and LC Rochester moved for amended findings or, in the alternative, a new trial. To support its motion for amended findings, LC Rochester argued that the district court erred in determining that the addendum controls and that Athena 2004’s breach was not material. Specifically, LC Rochester argued that, because the December 1, 2016, deadline in the addendum was a condition precedent that

was not fulfilled, the lease controls. LC Rochester argued that, under the terms of the lease, Athena 2004's failure to substantially complete the landlord's work within the required time excused LC Rochester's obligation to pay rent and entitled LC Rochester to liquidated damages.

The district court applied the disproportionate-forfeiture exception adopted by the supreme court in *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23 (Minn. 2018), and determined that the condition precedent set forth in the lease addendum was not material because LC Rochester was able to open within 17 days of its target date of January 17, 2017. The district court also found that LC Rochester's liquidated damages claim was "extreme" when measured against its purpose to allow a January 1 opening because the claim "exceeded \$260,000 and would have resulted in the forfeiture of rent" for a period of eight and a half years. Thus, the district court denied LC Rochester's motion for amended findings of fact or, in the alternative, a new trial.

In the same order, the district court determined that Athena 2004 was entitled to attorney fees under the paragraph 25(d) of the lease because LC Rochester breached the lease addendum. The district court also determined that LC Rochester was entitled to attorney fees under paragraph 32(a) of the lease because Athena 2004 was in breach. But, after using the lodestar method for determining the reasonableness of the requested attorney fees, the district court found that the "amount of attorney fees and costs sought by both parties is excessive considering the success achieved." The district court also found that it could not "determine the number of hours reasonably expended on litigation based on the evidence in the record." The district court, therefore, elected to "reduce the attorney fees and costs sought to account

for the limited success” of the parties, and awarded attorney fees and costs in the amount of \$10,000 to Athena 2004 and \$1,000 to LC Rochester. LC Rochester subsequently appealed and Athena 2004 filed a notice of related appeal.

DECISION

LC Rochester challenges the district court’s denial of its motion for amended findings. “Upon motion of a party . . . , the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered.” Minn. R. Civ. P. 52.02. This court reviews a “district court’s decision whether to grant a motion for amended findings for an abuse of discretion.” *Landmark Cmty. Bank, N.C. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. 2019); *see Stroh v. Stroh*, 383 N.W.2d 402, 407 (Minn. App. 1986) (“[T]he purpose of a motion to amend conclusions is to permit the [district] court a review of its own exercise of discretion.”). A district court abuses its discretion if “its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018) (quotation omitted).

“A condition precedent is a contract term that calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which the promisor’s obligation is made to depend.” *Capistrant*, 916 N.W.2d at 27 (quotation omitted). “[I]f the event required by the condition does not occur, there is no breach of contract.” *Id.* (quoting *451 Corp. v. Pension Sys. for Policemen & Firemen*, 310 N.W.2d 922, 924 (Minn. 1981)). The general rule is that “conditions must

be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition.” *Id.* at 27-28 (quotation omitted).

In *Capistrant*, however, the supreme court recognized a limited exception to the general rule regarding conditions precedent. *Id.* at 29. In that case, the supreme court stated that “[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless it was a material part of the agreed exchange.” *Id.* at 28 (quotation omitted).

LC Rochester maintains that the December 1, 2016, deadline contained in the addendum was a condition precedent and that, under the general rule, conditions precedent are always material. LC Rochester acknowledges the disproportionate-forfeiture exception discussed in *Capistrant*, but argues that the district court improperly applied that exception because (A) it was not pleaded or properly raised, and (B) the circumstances of this case do not warrant its application. Thus, LC Rochester argues that the language in the addendum does not control and that, under the lease, it is entitled to liquidated damages.¹

¹ Athena 2004 asserts that LC Rochester did not raise the enforceability of the condition precedent at trial. Indeed, the district court found that LC Rochester’s argument in its motion for amended findings “has shifted.” It is well settled that an issue is raised “too late” if it is first raised in a motion for a new trial or in a motion for amended findings. See *Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (stating that a new issue cannot be raised in a motion for a new trial); see also *Allen v. Cent. Motors, Inc.*, 283 N.W. 490, 492 (Minn. 1939) (stating that a new fact issue cannot be raised in a motion for amended findings). But Athena 2004 does not specifically argue that LC Rochester’s condition-precedent argument is not properly before this court. And the record reflects that, in its closing argument to the district court, LC Rochester argued that the addendum was a condition precedent. Moreover, LC Rochester has maintained throughout the proceedings that it is entitled to liquidated damages under the lease. As such, LC Rochester’s condition-precedent argument is properly before us.

A. *Was the disproportionate-forfeiture exception properly pleaded?*

In civil cases, our adversary system follows “the principle of party presentation.” *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 2564 (2008). Under this principle, parties are relied upon “to frame the issues for decision and assign to courts the role of neutral arbiter of matters *the parties present*.” *Id.*, 128 S. Ct. at 2564 (emphasis added). In other words, “[c]ourts do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.” *Id.* at 244, 128 S. Ct. at 2564 (quotation omitted).

LC Rochester asserts that Athena 2004 “did not raise the disproportionate-forfeiture [exception] in its pleading,” nor was that issue tried. LC Rochester argues that, because the disproportionate-forfeiture was not raised by Athena, the district court improperly relied on the exception. We agree.

The record reflects that Athena 2004 did not plead the disproportionate-forfeiture exception, nor did Athena 2004 mention the disproportionate-forfeiture exception in its posttrial submissions. And the record reflects that LC Rochester neither raised, nor discussed, the disproportionate-forfeiture exception. Although LC Rochester cited *Capistrant* in the memorandum supporting its motion for amended findings, it did not cite the case for a disproportionate-forfeiture proposition. Rather, *Capistrant* was cited as part of a string cite for the general rule that if conditions precedent are not literally met or exactly fulfilled, no liability can arise on the promise qualified by the condition. By applying the disproportionate-forfeiture exception when it was never raised by any of the

parties, the district court violated the principle of party presentation. Therefore, the district court erred by relying on the disproportionate-forfeiture exception discussed in *Capistrant*.

B. Was the disproportionate-forfeiture exception properly applied?

Even if the disproportionate-forfeiture exception discussed in *Capistrant* had been properly raised, the district court abused its discretion by applying it in this case. The issue in *Capistrant* involved an employment contract between the parties that required the employee to immediately deliver to the employer all of the employer's property that was in the employee's possession or control at the end of his employment. 916 N.W.2d at 25. The employment agreement provided that, if the employee breached this provision, the employer would "be entitled to terminate [the employer's] obligation to make payments of Residual Commission that have not yet been paid" to the employee. *Id.* Twenty-eight years after the employment agreement was signed, the employee retired. *Id.* At the time of his retirement, the employee was owed "millions of dollars" in commission. *Id.* at 28. When the employee asserted his right to his commissions, the employer demanded that the employee return documents that he had in his possession, and the employee returned the documents within three business days of the request. *Id.* at 25-26. The employer, however, refused to pay the commissions, arguing that its obligation to pay was excused because the employee had failed to comply with the return-of-property clause. *Id.* at 26.

On appeal, the supreme court recognized the "'general rule' that 'conditions must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition.'" *Id.* at 28 (quoting 13 Richard A. Lord, *Williston on Contracts* § 38.6 (4th ed. 2013)). But the supreme court stated that it had "never explicitly decided whether the

breach of a condition precedent must be material in order to relieve the non-breaching party of its obligation under the contract.” *Id.* The supreme court then acknowledged section 229 of the Restatement, which provides: “‘To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless it was a material part of the agreed exchange.’” *Id.* (quoting Restatement (Second) of Contracts § 229). The supreme court determined that in the “unique context” of the circumstances presented in the case, it was appropriate to look to guidance from section 229 because it “reflects our reluctance to enforce forfeitures.” *Id.* The supreme court then stated that section 229 “consists of two prongs: (1) whether the occurrence of the condition was a material part of the agreed exchange and (2) a proportionality analysis that balances the risk to be protected with the amount to be forfeited.” *Id.* at 29 (citing Restatement (Second) of Contracts § 229 cmts. b-c). The supreme court concluded that “the record in this case does not allow resolution of the materiality question as a matter of law” and therefore remanded the case “to allow the district court to resolve the materiality question in the first instance.” *Id.* at 30-31.

LC Rochester challenges the district court’s application of the disproportionate-forfeiture exception to the circumstances presented in this case, arguing that, although the supreme court adopted the disproportionate-forfeiture exception in *Capistrant*, it simultaneously limited the exception to the “unique circumstances” of that case. Whether to apply the disproportionate-forfeiture exception is discretionary. *Id.* at 31 (explaining that “‘the rule is, of necessity, a flexible one, and its application is within the sound discretion of the court’” (quoting Restatement (Second) of Contracts § 229 cmt. b)).

The supreme court in *Capistrant* stated that the circumstances in that case were “unique” and that the condition precedent operated “differently than the conditions at issue in our cases applying the general rule” because (1) the “parties had been performing under the contract for 28 years before the condition became operative,” (2) the “condition came into play only as the parties’ employment relationship was ending,” and (3) “the consequence of failing to comply with the return-of-property clause would be the forfeiture of millions of dollars.” *Id.* at 28 (emphasis added).

LC Rochester contends that the “context” in this case “is much different than that in *Capistrant*, in three ways”: (1) the “condition was unequivocal and unmistakable”; (2) the condition was “recent”; and (3) the condition was “between commercial businesses negotiating at arms-length.” LC Rochester argues that, in light of these differences, the district court abused its discretion by applying the exception rather than the general rule.

We agree that the circumstances presented in this case do not warrant application of the disproportionate-forfeiture exception discussed in *Capistrant*. The condition precedent at issue in *Capistrant* involved an employment contract, whereas the condition in this case involved a commercial lease, which is an entirely different type of agreement. Moreover, the supreme court in *Capistrant* specifically noted that the “*case is not about liquidated damages because [the employer] does not contend that the residual commission amount forfeited by [the employee’s] breach accurately represents the damages caused by [the employer’s] failure to return its property.*” *Id.* at 26 n.2 (emphasis added). In contrast, the lease at issue in this case contained a bargained-for liquidated-damages clause, which represented the amount of damages LC Rochester would incur if the substantially complete

deadline was not satisfied. The differences between this case and *Capistrant* are significant and, based on these significant differences, there is no indication that application of the disproportionate-forfeiture exception should be applied here.

Moreover, the disproportionate-forfeiture exception is only applicable if the agreed term is not material. *Id.* at 28 (“To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless it was a material part of the agreed exchange.” (quotation omitted)). A determination of whether the occurrence of the condition was a material part of the agreed exchange focuses on the root or essence of the contract. *See BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728 (Minn. App. 2011) (stating that a “material breach goes to the root or essence of the contract” (quotation omitted)), *review dismissed* (Minn. Aug. 12, 2011). “A material breach is a breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages.” *Id.* (quotation omitted).

Here, the plain language of the lease required Athena 2004 to substantially complete its work by September 1, 2014. The lease also provides that if Athena 2004 failed “to complete [its] work and deliver possession of the premises to [LC Rochester] on or prior to September 15, 2014, [LC Rochester] shall have the right, at any time prior to the date that [Athena 2004’s] work is substantially complete and accepted by [LC Rochester], to *terminate this lease* upon written notice to [Athena 2004].” (Emphasis added.) The provision allowing LC Rochester to terminate the lease if Athena 2004’s work was not

completed by the established deadline indicates that the substantial-completion deadline was material because Athena 2004's failure to substantially complete its work excused LC Rochester's performance under the agreement. *See BOB Acres*, 797 N.W.2d at 728-29. Although the addendum extended the deadline by which Athena 2004's work must be completed, it did not change the significance of Athena 2004 substantially completing its work by the agreed-upon deadline.

Additionally, the lease contained a liquidated-damages provision. That provision states that, if Athena 2004's work was not substantially completed by the specified deadline and LC Rochester accepted possession of the premises despite Athena 2004's failure to substantially complete its work by the deadline, "there shall accrue for the benefit of [LC Rochester], as liquidated damages, two . . . days rent . . . for each day that completion of [Athena 2004's] work is delayed . . ., and [LC Rochester] shall be entitled to deduct any such accrued amounts until applied in full against all rent coming due under th[e] lease." But LC Rochester's entitlement to liquidated damages was eliminated if Athena 2004 substantially completed its work by the new deadline contained in the addendum. The elimination of LC Rochester's ability to claim liquidated damages under the lease if Athena 2004 substantially completed its work by the agreed-upon deadline further indicates that the substantial-completion deadline was a material part of the agreement. Therefore, the district court abused its discretion by determining that the breach of the substantial-completion deadline was not material.

Because the district court abused its discretion by applying the disproportionate-forfeiture exception, the general rule regarding conditions precedent becomes applicable.

As stated above, that rule requires that conditions “be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition.” *Capistrant*, 916 N.W.2d at 27-28 (quotation omitted).

Here, the addendum states that the “amendments to the lease . . . are contingent upon [Athena 2004’s] Work being Substantially Completed by” December 1, 2016, and that, if Athena 2004 fails to substantially complete its work by the new deadline, “each of the amendments to the lease . . . shall be considered void *ab initio*.” The plain language of the addendum indicates that the addendum is a condition precedent because, if Athena 2004’s work were not substantially completed by the new deadline, the addendum would become void and the lease would control. *See id.* at 27 (“A condition precedent is a contract term that calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which the promisor’s obligation is made to depend.” (quotation omitted)). Athena 2004 does not disagree that the addendum constitutes a condition precedent. Moreover, the district court found that Athena 2004 did not substantially complete its work by the deadline set forth in the addendum, and that finding is supported by the record. As such, LC Rochester is entitled

to claim liquidated damages under the clear language of the lease.² We, therefore, reverse and remand for proceedings not inconsistent with this opinion.³

Reversed and remanded.

² Although we hold by this opinion that the liquidated-damages provision of the lease applies, we take no position, one way or the other, as to whether that provision constitutes a penalty under Minnesota law.

³ Because we reverse the decision of the district court, we need not address Athena 2004's attorney-fees argument raised in its notice of related appeal. That issue will need to be reconsidered following proceedings on remand.