STATE OF MINNESOTA
IN COURT OF APPEALS
A25-0039

Benchmark Investments, LLC,
Respondent,

vs.

Jennifer Mark, et al.,
Appellants.

Filed August 25, 2025
Reversed and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-19-16898

Christopher W. Boline, Felhaber Larson, Minneapolis, Minnesota (for respondent)

Kay Nord Hunt, Michelle K. Kuhl, Lommen Abdo, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Bentley, Presiding Judge; Larkin, Judge; and Segal, Judge.*

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant tenants challenge the district court's grant of summary judgment to respondent landlord in a dispute regarding a residential lease. Appellants argue that there

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

are genuine issues of material fact regarding which party breached the lease first. Respondent cross-appeals, arguing that the district court erred by not awarding all of respondent's requested attorney fees and costs. We reverse the summary judgment, as well as the award of attorney fees, and we remand for further proceedings.

FACTS

This appeal arises from a residential lease between appellants Jennifer Mark and Quy Ton (tenants) and respondent Benchmark Investments, LLC. John Anthony Newkirk is the sole member of Benchmark.

Benchmark listed its real property (the premises) for rent through Renters Warehouse, a property management company. On February 5, 2018, Ton toured the premises with a Renters Warehouse employee. Ton claims that during the tour, the employee told him that Benchmark's personal property would be removed from the premises. In March 2018, tenants submitted rental applications to Renters Warehouse.

On April 14 or 15, 2018, tenants entered into a residential lease with Benchmark. The lease includes several defined terms, including "Landlord" (Anthony Newkirk—President of Benchmark Investments, LLC), "Commencement Date" (July 1, 2018), "Term" (ten months starting on the Commencement Date), and "Premises" ("[t]hat certain real property located at the following street address"). The lease refers to Renters Warehouse as "Landlord's agent." The lease provides that, "[i]n the event Tenant and Landlord agree to an earlier move-in date as contemplated under this Lease, Tenant agrees to pay and Landlord agrees to accept pro-rated Rent," and the lease provided for pro-rated rent from June 15 to June 30, 2018. Finally, the lease provides that "[t]he court shall award reasonable attorneys' fees and costs to any party who prevails in a proceeding to enforce one or more terms of this Lease."

Starting in June 2018, Newkirk made several requests to postpone the date on which tenants would take possession of the premises. On June 5, 2018, Newkirk requested to stay at the premises until the beginning of July. On June 12, Newkirk emailed tenants to summarize the parties' agreement stating, "I'll stay in the house through June 30th, 2018," "[w]e'll extend the turn-over of keys, etc. and the inspection until that time—at which point you will take possession of the property," "[a]ll the other terms of the lease remain in effect, this is just a simple modification/change in the start date to July 1, 2018," and "[w]e agree to document this change by email." Tenants responded, "We are in agreement with the terms as stated, which postpones hand-over of keys from the original June 15 date. The new start date will be July 1 as requested by [Newkirk]. We are glad to find a mutually agreeable solution."

On June 27, Newkirk again asked for an extension of the possession date for "maybe 2 or 3 days, and no longer than a week." On June 29, Newkirk left tenants a voicemail, stating that he believed he would leave on Sunday of the following week and that the exchange of keys would be moved "from this coming July 1" to "the 8th of July." On July 1, tenants emailed Newkirk requesting that he "reply with a confirmation of our agreement for your extended stay through 7/8 as per your request by phone on 6/29." Newkirk responded that his leave date depended on a family member's surgery.

On July 3, tenants emailed a Renters Warehouse employee:

> We also heard from you that the owner may want to extend his stay again beyond July 8 by another couple/few days and that he would know if this is needed by the end of today. As we discussed, we are willing to extend the owner's stay/delay start date again if the owner can specify his new move-out day by the end of today. Of course, the above dates would thus be amended and additional pro-rated rent would also be due by the key hand-over date. This will allow us sufficient time to make arrangements for a new inspection and key hand-over date.

The record does not show any additional communications between tenants and Renters Warehouse or between tenants and Benchmark until July 11, when a Renters Warehouse employee emailed Ton, stating that "things are still on course for the move in date on July 16th."

While negotiating a new possession date, tenants expressed concern that Benchmark's personal property remained on the premises. In a July 3 email to a Renters Warehouse employee, tenants stated that they had previously received assurance from another Renters Warehouse employee that Benchmark's personal property would be removed from the attic, closets, garage, and other areas on the premises before tenants took possession. Tenants sought confirmation because they had not received replies to their inquiries regarding removal of Benchmark's personal property. Newkirk informed tenants, through Renters Warehouse, that he had "always" used certain areas for storage, that there would still be "plenty of space" for tenants, and that the lease's "as is" clause included "the already existing Owners Storage spaces, of course." Ton claims that, in a July 12 call with Renters Warehouse, an employee confirmed that Newkirk's interpretation of the "as is" clause was incorrect.

After tenants postponed the key hand-off due to disagreements regarding lease amendments, Ton's brother and sister-in-law completed a walkthrough of the premises on July 28, 2018, with Ton watching on FaceTime. They did not accept the keys because Benchmark's personal property remained on the premises. Tenants never took possession of the premises.

In August 2018, Benchmark sent tenants a proposed lease modification stating that landlord storage is a "common practice" and "shouldn't be a surprise," but that Benchmark would provide three hours of "Mike's Handyman Labor to support" tenants' requests regarding the personal property on the premises.

Tenants sued Benchmark in conciliation court to recover their advanced rent payments, security deposit, and attorney fees, claiming that Benchmark breached the lease. Benchmark removed the action to district court, claimed that tenants breached the lease, and moved for summary judgment and attorney fees.

The district court granted summary judgment for Benchmark, reasoning that tenants breached the lease by failing to occupy the premises, by not paying rent and utilities, and by not doing certain maintenance as agreed under the lease. The district court concluded that Benchmark did not breach the lease. The district court awarded Benchmark judgment in the amount of $21,772.94. The district court also awarded Benchmark attorney fees of $45,000 as the prevailing party under the lease, instead of the nearly $75,000 that Benchmark had requested. The district court denied Benchmark's request for $8,300.50 in paralegal fees.

Tenants appeal, and Benchmark cross-appeals.

DECISION

The district court must grant summary judgment if the moving party shows "there is no genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. We review a district court's grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). In doing so, 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.* Summary judgment is inappropriate if reasonable people can draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The party moving for summary judgment must support his assertion that there is no genuine issue regarding any material fact by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine issue for trial." Minn. R. Civ. P. 56.03(a). In response, the nonmoving party "must do more than rest on averments or denials of the adverse party's pleading." *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). The nonmoving party must identify specific facts that establish the existence of a triable issue of fact. *Papenhausen v. Schoen*, 268 N.W.2d 565, 571 (Minn. 1978).

Tenants contend that summary judgment was inappropriate because there are "genuine issues of material fact regarding who breached [the lease] first."

"[A] lease is a form of contract." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). A material uncured breach of a contract by one party excuses performance by the other party. *See Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 84 (Minn. 2004) (stating that the "remaining duties of one party to a contract are conditioned on there being no previous uncured material failure by the other party" (quotation omitted)); *Soderbeck v. Ctr. for Diagnostic Imaging, Inc.*, 793 N.W.2d 437, 441 (Minn. App. 2010) ("[I]t is elementary that a breach of a contract by one party excuses performance by the other." (quotation omitted)). "[A] material breach is a breach that goes to the essence of the parties' agreement, affecting the purpose of the contract in a vital way." *Kuhn v. Dunn*, 8 N.W.3d 633, 640-41 (Minn. 2024) (quotations omitted). "Whether an act or omission constitutes a material breach of a contract is a fact question." *Sitek v. Striker*, 764 N.W.2d 585, 593 (Minn. App. 2009), *rev. denied* (Minn. July 22, 2009).

Possession Date

Tenants argue that they presented evidence that Benchmark breached the lease by failing to deliver possession of the premises on June 15, 2018, as agreed in the lease. Benchmark does not dispute that tenants did not receive possession of the premises on June 15, 2018. Instead, Benchmark argues that the parties modified the possession date in the lease. Tenants counter that whether the parties modified the lease should be determined by a jury.

"A written contract may be modified subsequent to its execution by the acts and conduct of the parties in the same manner as a contract may be entered into in the first place." *Wormsbecker v. Donovan Constr. Co.*, 76 N.W.2d 643, 645 (Minn. 1956). If a contract is modified by the parties' consent, "it consists thereafter of the new terms and of all of the old ones which were not changed, and a subordinate and separable part of a contract may always be modified by the parties without a cancellation or avoidance of the whole contract." *Knight v. McGinity*, 868 N.W.2d 298, 301 (Minn. App. 2015) (emphasis omitted) (quotation omitted). "While a written contract may be modified by the parties' subsequent conduct, whether such a modification occurred is a question for the factfinder." *Poser v. Abel*, 510 N.W.2d 224, 228 (Minn. App. 1994), *rev. denied* (Minn. Feb. 24, 1994).

The parties' lease states that it "shall not be modified, changed, altered or amended in any way except through the use of a written amendment signed by all of the Parties hereto." However, under common law, "even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parol negotiation." 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, Corbin on Contracts § 7.14, at 404 (rev. ed. 1995) (quotation omitted). The parol evidence rule "has no application whatever to subsequent agreements modifying or rescinding the original contract." 4 Caroline N. Brown, Corbin on Contracts § 13.1, at 110 (rev. ed. 1997).

Minnesota precedent is in accord with those secondary authorities. The Minnesota Supreme Court has stated that "the parol evidence rule is not violated by testimony of subsequent discussions in transactions relating to alterations of the original contract." *Duffy v. Park Terrace Supper Club, Inc.*, 206 N.W.2d 24, 27 (Minn. 1973). And this court has stated that "[p]arol evidence is admissible to show a subsequent modification of an original contract." *Mollico v. Mollico*, 628 N.W.2d 637, 642 (Minn. App. 2001). We therefore consider parol evidence when determining whether there is a genuine issue of fact regarding the alleged lease modification.

The lease indicates that the parties originally agreed to a June 15, 2018 possession date. When Newkirk requested to stay at the premises until July 1, tenants explicitly stated that they were in "agreement" with the arrangement. Tenants later requested that Newkirk "reply with a confirmation of our agreement for your extended stay through 7/8 as per your request by phone on 6/29." And tenants expressed to Renters Warehouse that they had agreed to a July 9 move-in with Newkirk: "As discussed, it is our understanding that the owner plans to move out on 7/8 and the house to be ready for us to take possession on 7/9/18. Per agreement with the owner, we will be reimbursed rent for the time period June 15-30 and July 1-8 . . . ."

On July 3, tenants emailed a Renters Warehouse employee:

> We also heard from you that the owner may want to extend his stay again beyond July 8 by another couple/few days and that he would know if this is needed by the end of today. As we discussed, we are willing to extend the owner's stay/delay the start date again if the owner can specify his new move-out day by the end of today.

According to the record, the next communication regarding the possession date was on July 11, when a Renters Warehouse employee emailed Ton that "things are still on course for the move in date on July 16th." There is no indication that tenants took possession on July 16. Instead, on July 28, Ton's brother and sister-in-law completed a walkthrough of the premises, with Ton watching on FaceTime.

In granting summary judgment, the district court reasoned:

> Clearly there was some communication between the parties between July 3 and July 11 that the move-in date had again been delayed, however the Court is not clear how that communication happened. Again, because of the wording of

> the email and no evidence to the contrary, the delayed date must have been agreed to by the [tenants].

Tenants argue that the district court erroneously engaged in fact-finding. Specifically, tenants argue that the district court impermissibly found that they agreed to delay the July 9 possession date and that its award of summary judgment should be reversed on that ground. At oral argument to this court, Benchmark countered that the district court took a "common-sense view" and that tenants' conduct—such as setting up utilities and lawn care starting on July 16—supported the district court's statement that tenants "must have" agreed to the July 16 date.

"Common sense" is not the correct legal standard. "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc.*, 566 N.W.2d at 70. "[T]he [district] court must not weigh the evidence on a motion for summary judgment. *Id.* And on appeal, we "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Dukowitz*, 841 N.W.2d at 150. However, our de novo application of those standards to the record does not reveal a genuine issue of material fact for trial.

The record shows that tenants expressly agreed to extend the possession date several times and ultimately participated in a final walkthrough on July 28. Even if tenants did not expressly agree to an extension at some point between July 3 and July 11, given their conduct after July 11, there is no genuine issue of material fact regarding whether they agreed to further delay possession. In sum, we need not determine whether the district court engaged in impermissible fact-finding regarding any express agreement by tenants occurring between July 3 and July 11 because that dispute is immaterial given tenants' contract-modifying conduct after July 11.

In short, tenants have not shown a genuine issue of material fact regarding whether Benchmark breached the lease by not delivering timely possession of the premises. However, for the reasons discussed next, Benchmark was not entitled to judgment as a matter of law. *See* Minn. R. Civ. P. 56.01 (stating that summary judgment must be granted if the moving party shows "there is no genuine issue as to any material fact" *and* the moving party is "entitled to judgment as a matter of law").

Delivery of Entire Premises

Tenants also argue that because Benchmark did not remove its personal property from the premises, it did not deliver possession of the entire premises at any time and that, therefore, Benchmark breached the lease. The district court rejected that argument, reasoning:

> [Tenants] also argue that [Benchmark] breached the Lease for not clearing all of [Benchmark's] personal property out of the Property, which encroached on their ability to fully use the Property and posed a safety risk. However, the Lease clearly states that at the time the Lease was executed, [tenants] agreed to, among other things, these two things: 1) [tenants] had visually examined the Property and it was in *good order*, repair and *safe*, clean and *habitable*; and 2) [tenants] agree to take the Property "as-is." [Tenants] argue that their conversations with Renters Warehouse led them to believe things would be different. But the fact remains that [tenants] executed the Lease, which included that language. The parties have not argued, nor has the Court found that the language of the Lease is ambiguous. Therefore, other conversations, not memorialized in the written Lease, are not binding on [Benchmark]. "Where the language is unambiguous, [] courts must give the language its ordinary meaning and not redraft the

> contract." *Simon v. Milwaukee Automobile Mutual Insurance Co.*, 262 Minn. 378, 385, 115 N.W.2d 40, 45 (1962).

(Record citation omitted.)

Tenants assert that the district court erred in concluding that, because tenants agreed to accept the premises "as is," Benchmark's storage of personal property on the premises did not constitute a breach.

The district court's ruling and the parties' arguments focus on the following "as is" clause in the lease, which provides:

> <u>CONDITION OF PREMISES.</u> Tenant stipulates, represents, and warrants that Tenant has visually examined the Premises, and that it is, at the time of this Lease, in good order, repair, and in a safe, clean, and habitable condition. Furthermore, by signing this Lease, Tenant acknowledges and agrees that it has taken the Premises "As-Is" unless otherwise noted in this Lease. Tenant also agrees to the following:
>
> -All drains, waste pipes, and plumbing are accepted as clear by Tenant at the time of occupancy, and any material blocking them after occupancy shall be repaired at Landlord's cost, unless determined by repair person that such blockage occurred during the time Tenant controlled the Premises and due to some fault or negligence of Tenant, specifically excluding blockages caused by roots or backups from the street.

The parties raise an issue of contract interpretation. "If no ambiguity exists, interpretation of the contract and its legal effect are questions of law for the court, but where the language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury unless such evidence is conclusive." *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 643 (Minn. App. 1985) (citation omitted), *rev. denied* (Minn. June 24, 1985). "A contract is ambiguous if it is reasonably susceptible to more than one construction." *Id.* at 644.

Tenants and Benchmark each assert that the "as is" clause is unambiguous; however, they read the clause differently.[1] Tenants argue that the clause "unambiguously does not apply" to the storage of personal items on the premises. Benchmark argues that the clause unambiguously applies to the personal property that Ton observed when he toured the premises on February 5, 2018.

On appeal, a reviewing court may determine whether a contract is ambiguous "without deference to the [district] court's determination." *Id.* at 643; *see Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003) ("The initial determination as to whether a contract is ambiguous is a question of law."), *rev. denied* (Minn. Nov. 18, 2003). Thus, although tenants and Benchmark assert that the "as is" clause is unambiguous and the district court did not conclude otherwise, we determine whether the clause is ambiguous de novo.

In assessing whether the parties' competing interpretations are reasonable, we first consider whether there is any relevant authority. Benchmark has not cited precedential authority indicating that an "as is" clause applies to personal property stored on real

[1] Benchmark asserts that any "contract ambiguity argument" is not properly before us because tenants did not raise it in district court. But because the district court considered and decided that the lease was unambiguous and that extrinsic evidence regarding tenants' communications with Renters Warehouse therefore could not be considered, this issue is properly before us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("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." (quotation omitted)).

property. Nor has Benchmark cited precedential authority interpreting an "as is" clause in the context of a residential lease.

A secondary authority states that the purpose of an "as is" clause is to protect a seller "against liability for physical defects in the conveyed premises." Frank J. Wozniak, Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in Its Existing Condition*, 8 A.L.R. 5th § 2[a], at 327 (1992). And this court's nonprecedential caselaw addressing "as is" clauses regards physical and mechanical defects. *See, e.g.*, *Beckman v. Wells Fargo Bank, N.A.*, No. A15-1819, 2016 WL 5640664, at *3, 9 (Minn. App. Oct. 3, 2016) (considering application of "as is" clause to allegations of fire, water, and mold damage, and contaminated flooring); *Oliva v. Lantz*, No. A05-2502, 2006 WL 2256949, at *2 (Minn. App. Aug. 8, 2006) (addressing whether "as is" clause applies to sewer and water connections to a home). Other jurisdictions have similarly applied "as is" clauses to physical and mechanical defects. *See, e.g.*, *Chapman ex rel. Chapman v. Mut. Serv. Cas. Ins. Co.*, 35 F. Supp. 2d 699, 703-04, 707 (E.D. Wis. 1999) (regarding lead-based paint); *La Placita Partners v. Nw. Mut. Life Ins. Co.*, 766 F. Supp. 1454, 1458-59 (N.D. Ohio 1990) (regarding asbestos); *Ray v. Montgomery*, 399 So.2d 230, 232-33 (Ala. 1980) (regarding termite damage); *Murray v. Bostwick*, 276 So. 3d 1120, 1123, 1126 (La. Ct. App. 2019) (regarding plumbing issues).

We are not aware of any precedential authority indicating that the "as is" clause in the parties' lease applies to personal property on the premises, as opposed to physical and mechanical defects. More fundamentally, the "as is" clause does not mention personal property; instead, it mentions physical components such as "drains, waste pipes, and plumbing." Thus, tenants' interpretation of the clause—that it does not apply to personal property—is reasonable. However, the district court and Benchmark's interpretation is also reasonable: the presence of personal property in a residential rental property could impact whether the premises are "in a safe, clean, and habitable condition," as that phrase is used in the "as is" clause here. We therefore conclude that the "as is" clause is ambiguous. Thus, "resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury unless such evidence is conclusive." *Blackburn*, 366 N.W.2d at 643.

"The cardinal purpose of construing a contract is to ascertain the intention of the parties from the language used by them and by a construction of the entire instrument." *Emps. Liab. Assurance Corp. v. Morse*, 111 N.W.2d 620, 624 (Minn. 1961). As to whether the evidence is conclusive regarding the parties' intent, tenants presented evidence that during the February 2018 tour of the premises, Ton asked the Renters Warehouse employee if Benchmark's personal property would be removed from the premises, and the employee told him that it would be removed. Additionally, tenants presented evidence that Ton requested that the lease include a clause stating that Benchmark would remove its personal property from the premises and was told by a Renters Warehouse employee that a clause was unnecessary because the "items would be removed and only a small amount of items related to maintenance of the home would be allowed to remain unless items were specified in the lease." Tenants also provided evidence that a March 22, 2018 email from a Renters Warehouse employee, as well as an April 10, 2018 phone call with the employee, confirmed that the personal property would be removed. Finally, tenants provided evidence that on June 27, 2018, Ton emailed Newkirk that, in a prior discussion with a Renters Warehouse employee, the employee had "confirmed that as part of the house being ready to be handed over, any remaining items in the garage, attic or closets would be removed so we would be able to access these areas. Please let us know if this is incorrect."

In sum, the record contains evidence that Renters Warehouse—as Benchmark's "agent" under the lease—repeatedly assured tenants that personal property would be removed from the premises. Thus, tenants presented sufficient evidence to raise genuine issues of material fact regarding three questions: (1) whether the parties intended the "as is" clause to apply to personal property on the premises, (2) if not, whether Benchmark's failure to remove the personal property constituted a material breach, and (3) if so, whether Benchmark cured that breach. *See Schwickert, Inc.*, 680 N.W.2d at 84 (stating that the "remaining duties of one party to a contract are conditioned on there being no previous uncured material failure by the other party" (quotation omitted)).

In short, tenants have shown a genuine issue of material fact regarding whether Benchmark breached the lease by not delivering possession of the entire premises. We therefore reverse summary judgment.

Attorney Fees Award

Again, the parties' lease provides that "[t]he court shall award reasonable attorneys' fees and costs to any party who prevails in a proceeding to enforce one or more terms of this Lease." The district court ruled that "[Benchmark] has been successful in its claims against [tenants], thereby making [Benchmark] the prevailing party." Because the district court's award of attorney fees was based on its conclusions that "[tenants] breached the Lease and [Benchmark] did not," and we have concluded that there is a genuine issue of material fact regarding whether Benchmark breached the lease by not delivering possession of the entire premises, we reverse the award of attorney fees pending resolution of this matter on remand.

Conclusion

Although tenants have not shown a genuine issue of material fact regarding whether Benchmark breached the lease by not delivering timely possession of the premises, there are genuine issues of material fact regarding whether Benchmark breached the lease by failing to deliver possession of the entire premises. We therefore reverse summary judgment, as well as the award of attorney fees for Benchmark, and remand for further proceedings not inconsistent with this opinion.[2]

Reversed and remanded.

[2] Because the district court did not consider and determine tenants' argument that the lease terminated by its own terms when Benchmark failed to deliver possession of the property under the terms set forth in paragraph 13 of the lease, that argument is not properly before us, and we do not consider it. *See Thiele*, 425 N.W.2d at 582.