STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1038

David M. Smith, et al.,
Respondents,

vs.

Temple Corp., Inc., et al.,
Appellants.

Filed August 7, 2023
Affirmed
Bryan, Judge

St. Louis County District Court
File No. 69DU-CV-20-1845

Jude Schmit, Legal Aid of Northeastern Minnesota, Duluth, Minnesota (for respondents)

William D. Paul, Miles J. Ringsred, Duluth, Minnesota (for appellants)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from judgment in consolidated emergency tenant remedies action (ETRA) petitions, appellant-landlords challenge the denial of their pretrial motion to dismiss and the district court's posttrial factual findings concerning damages. We affirm.

FACTS

On October 23, 2020, David M. Smith, respondent and residential tenant at an apartment in Duluth, Minnesota ("St. Regis"), brought an ETRA pursuant to Minnesota Statutes section 504B.381 (2022),[1] alleging that the building had no heat after the St. Regis boiler system failed. Other residential tenants filed additional ETRA petitions, and the district court issued an ex parte order for emergency relief, ordering appellant Temple Corporation, Inc., et al. (landlords) to immediately restore heat. Following a hearing on November 2, the district court consolidated the various ETRA petitions and ordered landlords to continue taking steps to repair the boiler system. In a separate order on November 17, the district court required landlords to locate and pay for temporary housing for affected residents of St. Regis.

Landlords filed an answer and a subsequent motion to dismiss, asserting the following four legal defenses: (1) tenants' nonpayment of rent meant that they no longer met the statutory definition of "residential tenants" and, therefore, they lacked standing to bring the ETRAs; (2) pursuant to general contract principles, tenants' nonpayment of rent constituted a material breach of the lease, justifying landlords' breach of their statutory covenants of habitability; (3) pursuant to the language in *Fritz v. Warthen*, 213 N.W.2d 339, 343 (1973) (holding that tenants may assert a breach of the covenants of habitability as a defense to an eviction action), landlords can assert that tenants failed to pay rent as a

[1] The Minnesota Legislature recently amended section 504B.381, *see* 2023 Minn. Laws ch. 52, art. 19 § 93-95, but those amendments do not affect the provisions at issue in this appeal.

legal defense to the ETRAs; and (4) pursuant to the provisions governing rent-escrow actions, Minn. Stat. § 504B.385 (2022), landlords are entitled to dismissal of the ETRAs and possession of the premises because tenants failed to pay rent in escrow.

The district court denied the motion to dismiss, concluding that landlords' second, third, and fourth arguments had no valid basis in the law. The district court, however, also construed portions of the motion—including the first argument—as a summary judgment motion. The district court received additional written submissions regarding the existence of a genuine fact dispute on these portions of the motion. The district court then denied the motion, specifically noting that factual disputes remained regarding whether tenants satisfied the definition of "residential tenants," whether tenants' conduct caused the emergency underlying the ETRA petitions, and damages:

> [Tenants'] claims . . . create genuine issues of material fact on . . . whether [tenants] are all in fact 'residential tenants' within the meaning of Minn. Stat. § 504B.001, subd. 12 [(2022)], whether the emergency can in any way be found to be the result of 'the deliberate or negligent act or omission of a residential tenant . . .' Minn. Stat. § 504B.381, subd. 6, and what relief is appropriate under Minn. Stat. § 504B.425 subds. (b) through (g) [(2022)].

On February 26, 2021, the district court presided over an evidentiary hearing concerning whether tenants satisfied the definition of "residential tenants." In an order on March 3, 2021, the district court concluded that tenants were "residential tenants" as statutorily defined, and they had standing. The district court then presided over an evidentiary hearing on April 27 concerning whether and how rent abatement and consequential damages should be awarded to individual tenants. Tenants testified

regarding the expenses they incurred while having to move to and stay in temporary housing as a result of the heat emergency. The district court ultimately concluded that tenants' nonpayment of rent had not caused the emergency underlying the ETRA petitions and awarded over $27,000 in "rent credits/abatement" to tenants.[2] This appeal follows.

DECISION

Landlords challenge the district court's denial of their motion to dismiss and the district court's factual findings underlying its award of damages. We conclude that landlords have not established that the asserted defenses are available in an ETRA and because landlords did not provide this court with a transcript, we affirm the district court's factual findings regarding damages.

I. The District Court's Decision Denying Landlords' Motion to Dismiss

Residential landlords and tenants have various claims and defenses available to them pursuant to statute: "The legislature included several different remedies in chapter 504B—equitable, criminal, and civil—that tenants can pursue in the event their landlord (either directly or indirectly) removes them from a residential premises." *Reimringer v. Anderson*, 960 N.W.2d 684, 689 (Minn. 2021). An ETRA is one of these distinct statutory remedies, Minn. Stat. § 504B.381, as is a rent-escrow action, Minn. Stat. § 504B.385 (2022). The legislature also provided landlords with a statutory cause of action in the event that a tenant fails to pay rent: eviction. Minn. Stat. § 504B.291 (2022). The legislature included in this statutory framework certain basic guarantees for tenants, establishing that

[2] The district court itemized the amounts awarded to each of the tenants listed in the eight different court file numbers. These awards ranged from $2,340.00 to $7,057.88.

covenants of habitability are implied in every residential lease. Minn. Stat. § 504B.161 (2022). As a defense to an eviction action, a tenant may argue that its nonpayment was justified by the landlord's violation of the statutory covenants of habitability. *Fritz*, 213 N.W.2d at 341 ("[T]he tenant may now assert breach of the statutory covenants in excuse, justification, or avoidance of the landlord's [eviction] action.") (quotation omitted).

With that framework in mind, we construe landlords' arguments as a challenge to the district court's rejection of the following three legal defenses asserted by landlords in their motion to dismiss:[3] (1) based on general contract principles, landlords' violation of the covenants of habitability was justified by tenants' material breach of the lease (nonpayment of rent); (2) based on language from *Fritz*, landlords may assert a common law defense in response to an ETRA that tenants breached their covenant to pay rent; and (3) pursuant to the provisions governing rent-escrow actions, Minn. Stat. § 504B.385, landlords are entitled to possession of the premises because tenants failed to pay rent in escrow during the pendency of the ETRAs. "When the material facts are not in dispute, we review the lower court's application of the law de novo." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).[4] Tenants argue that landlords' arguments misconstrue the law. We agree with tenants and the district court that landlords' arguments lack merit.

A. Applicability of a General Breach-of-Contract Defense

Landlords are correct that when responding to a claim for breach-of-contract, a defendant can avoid liability if the plaintiff materially breached the contract first. *See*

[3] On appeal, landlords do not challenge the decision regarding tenants' standing.
[4] Landlords do not dispute the facts relating to any of the legal defenses at issue.

Carlson Real Est. Co. v. Soltan, 549 N.W.2d 376, 380 (Minn. App. 1996) ("The first breach serves as a defense against the subsequent breach."), *rev. denied* (Minn. Aug. 20, 1996). Landlords extrapolate from that principle a legal defense to an ETRA based on tenants' nonpayment of rent.[5] We are not convinced for the following three reasons.

First, tenants have not raised a breach-of-contract claim, and landlords cite to no authority that permits a party to raise a general contract defense in response to an ETRA. We are careful to differentiate between distinct causes of action, and we have previously limited the available counterclaims in an eviction action under chapter 504B because of the unique summary nature of those proceedings. *See* Minn. Stat. § 504B.001, subd. 4 (2022) (defining eviction proceedings as summary proceedings to efficiently adjudicate only a single issue: the present right to possess real property); *SVAP III Riverdale Commons LLC v. Coon Rapids Gyms, LLC*, 967 N.W.2d 81, 86 (Minn. App. 2021) (declining to "recognize for the first time common-law affirmative defenses of impossibility or frustration of purpose in an eviction action alleging non-payment of rent"); *Amresco Residential Mortg. Corp. v. Stange*, 631 N.W.2d 444, 445-446 (Minn. App. 2001) (holding that a tenant could not raise equitable counterclaims in response to an eviction complaint). Absent a citation to some legal authority, we decline to reverse the district court's decision that general defenses to a breach-of-contract claim are not applicable in a specific statutory proceeding

[5] Landlords also argue that tenants breached the implied duty of good faith and fair dealing when they did not pay rent. Landlords cite to no authority to support the proposition that a party breaches the implied duty of good faith and fair dealing whenever a party breaches an expressed contractual duty. Therefore, we decline to separately consider any argument regarding whether the tenants breached the implied duty of good faith and fair dealing.

under chapter 504B. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1974) ("[O]n appeal error . . . 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."); *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

Second, we observe that the legislature provided a single enumerated defense (apart from disputing the allegations that an emergency exists) that landlords may assert in response to an ETRA: "Limitation. This section does not extend to emergencies that are the result of the deliberate or negligent act or omission of a residential tenant or anyone acting under the direction or control of the residential tenant." Minn. Stat. § 504B.381, subd. 6.[6] Landlords make no argument the statutory provisions are ambiguous or that the legislature intended to permit general defenses other than the single enumerated ETRA defense. Nor do they offer any analysis that would justify this court recognizing the applicability of unenumerated defenses in light of the one, specific defense set forth in subdivision 6 of the ETRA statute. *See Axelberg v. Comm'r of Pub. Safety*, 848 N.W.2d 206, 209-10 (Minn. 2014) (refusing to allow the affirmative defense of duress in a statutory implied consent proceeding because the specific enumerated defenses in the statute did not

[6] Although landlords write that "because the tenants were not paying rent . . . , [landlords were] unable to secure financing," landlords do not assign error to the causation findings of the district court. Therefore, we decline to review the district court's determination that the tenants did not cause the loss of heat at issue in this case.

include a duress defense), *superseded by statute*, Act of May 22, 2015, ch. 65 § 10, 2015 Minn. Laws 474, 527 (codified at Minn. Stat. § 169A.53, subd. 3 (Supp. 2015)).[7]

Third, landlords cite no authority, and we are aware of none, that allows a landlord to violate its statutory covenants of habitability in response to a tenant's breach of a lease provision. *See, e.g.*, *Berg v. Wiley*, 264 N.W.2d 145, 151 (Minn. 1978) (adopting "the modern view" that the "unlawful detainer statutes[] are the exclusive remedy by which a landlord may remove a tenant . . . who claims possession adversely to a landlord's claim of breach of a written lease" (citations omitted)); *see also* Minn. Stat. § 504B.225 (2022) (making it a misdemeanor for a landlord to "intentionally interrupt[] . . . heat, gas, or water services to the tenant with intent to unlawfully remove or exclude the tenant from lands or tenements"). Tenants correctly observe that landlords' argument conflicts with section 504B.161, subd. 1(b), which makes the covenants of habitability unwaivable. Given the arguments as presented to us, we are not persuaded to adopt a new rule that would permit landlords to violate the covenants of habitability when a tenant fails to pay rent.

B. *Existence of a Nonpayment Defense Based on* Fritz

Landlords next look to language in *Fritz* to convince us that the supreme court recognized a landlord's common law right to assert nonpayment of rent as a defense to an

[7] We are also concerned that, as tenants point out, the language of the specific defense in subdivision 6, which centers on the negligent conduct of the tenant, could be incompatible with a general contract defense. *See Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 424 (Minn. 1987) (concluding that the law does not recognize negligent or tortious breach of contract). Given our determination that landlords are limited to the enumerated defense in subdivision 6, we need not address whether the inclusion of the term "negligent" in subdivision 6 precludes a defense based on general contract principles.

ETRA. While we acknowledge that the *Fritz* court conceived of the statutory covenants of habitability and the tenant's covenant to pay rent as "mutually dependent," we are not convinced to adopt landlords' interpretation of *Fritz* for two reasons.

First, the holding in *Fritz* concerned whether a *tenant* could assert a defense to an *eviction action*; it did not relate to what defenses might be available to a landlord and did not concern an ETRA. The court in *Fritz* analyzed "the language of the unlawful detainer statute" and concluded that it was "broad enough to permit a tenant to assert breach of the statutory covenants as a defense" because the language included the phrase "after any rent becomes due." 213 N.W.2d at 342. The court reasoned that, because of the legislative objective in assuring "adequate and tenantable housing," a tenant's rent was only due if the landlord was in compliance with the statutory covenants of habitability. *Id.* As noted above, landlords direct us to no authority that would permit them to intentionally interrupt the provision of heat to the tenants, that conditions the provision of heat on payment of rent, or that identifies an analogous legislative objective to the one relied on in *Fritz*. Moreover, the holding and analysis in *Ellis v. Doe*, 924 N.W.2d 258, 261, 265 (Minn. 2019), undermines landlords' interpretation of *Fritz*. In *Ellis*, the supreme court discussed the interplay between a tenant's right to assert the habitability defense acknowledged in *Fritz* and the tenant's right to bring a rent-escrow action. *Id.* The court concluded that a rent-escrow action is not the codification of the habitability defense, but instead it is "a separate, complementary remedy" to the tenant's habitability defense in an eviction action. *Id*. We think that the same analysis supports an understanding of an ETRA as a separate remedy to a rent-escrow action and the habitability defense in an eviction action.

Second, Landlords' argument overlooks certain differences between the kinds of specific emergencies that can give rise to an ETRA and the broad, general language that constitute the statutory covenants of habitability. *Compare* Minn. Stat. § 504B.381, subd. 1 (permitting ETRA petition "in cases of emergency involving the loss of running water, hot water, heat, electricity, sanitary facilities, or other essential services . . . that the landlord is responsible for providing"), *with* Minn. Stat. § 504B.161 subd. 1 (listing covenants of habitability as including a covenant to ensure "that the premises and all common areas are fit for the use intended," a covenant "to keep the premises in reasonable repair," and a covenant "to maintain the premises in compliance with the applicable health and safety laws"). Landlords provide no analysis or legal authority that would permit us to equate general violations of the statutory covenants of habitability with the specific emergencies contemplated in the ETRA statute. Absent such legal analysis we are not inclined to interpret *Fritz* as recognizing a nonpayment defense to an ETRA.

C. *Existence of Counterclaim for Possession in Response to an ETRA*

Landlords also challenge the district court's decision to reject their request for possession of the premises as a result of tenants' failure to pay rent in escrow. We are not persuaded to reverse on this basis because landlords provide no legal authority to support their argument.

We acknowledge that the legislature specifically contemplated the availability of a counterclaim for possession of the premises when a tenant files a rent-escrow action. Minn. Stat. § 504B.385, subd. 2 ("The landlord may file a counterclaim for possession of the property in cases where the landlord alleges that the residential tenant did not deposit the

full amount of rent with the court administrator."). No such counterclaim is enumerated in the ETRA statute, and unlike a rent-escrow action, an ETRA does not require a tenant to pay rent in escrow. *Compare* Minn. Stat. § 504B.381, *with* § 504B.385. There are other important differences between the statutes as well, including the fact that, unlike the ETRA statute, the rent-escrow action statute expressly incorporates the defenses enumerated in section 504B.415 (2022) as defenses to a rent-escrow action. Absent some authority that the enumerated counterclaims and defenses applicable to a landlord in a rent-escrow action are also applicable in an ETRA, we decline to reverse the district court's rejection of landlords' counterclaim for possession.[8]

II. The District Court's Findings of Fact Underlying the Damages Award

Landlords also appeal the award of damages, arguing that the district court clearly erred in its findings of fact and calculation of damages because the evidence presented by tenants at the evidentiary hearings failed to establish damages with sufficient certainty. However, landlords did not order a transcript for these hearings or submit a transcript as part of the appellate record.

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[8] Landlords also argue that they were relieved of the statutory covenants of habitability upon the issuance of Emergency Executive Orders suspending eviction actions. *See* Emerg. Exec. Order No. 20-14, *Suspending Evictions and Writs of Recovery During the COVID-19 Peacetime Emergency* (Mar. 23, 2020); Emerg. Exec. Order No. 20-73, *Clarifying Executive Order 20-14 Suspending Evictions and Writs of Recovery During the COVID-19 Peacetime Emergency* (June 5, 2020). The language of these orders includes no provisions regarding a landlord's covenants of habitability and landlords provide no authority for the proposition that the executive orders suspended this duty. Therefore, we deem the argument forfeited. *Waters*, 13 N.W.2d at 464-65; *Schoepke*, 187 N.W.2d at 135. In light of this decision, we also need not address whether these emergency orders precluded landlords from making counterclaims for possession of the premises in response to rent-escrow actions.

The ETRA statute provides that, upon finding that the claims in the petition have been proven, "[t]he court may order relief as provided in section 504B.425." Minn. Stat. § 504B.381, subd. 5. Section 504B.425 lists various forms of relief the district court may grant "either alone or in combination" including "any . . . relief [the court] deems just and proper," and "reasonable attorney fees, not to exceed $500, in the case of a prevailing residential tenant." District courts have broad discretion to determine damages, *W. St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. App. 2006), and "[f]actual issues embedded in a discretionary determination are reviewed for clear error," *In re Ruth Easton Fund*, 680 N.W.2d 541, 547 (Minn. App. 2004).

Here, the district court awarded tenants varying amounts based on the evidence presented of the costs that the tenants incurred while displaced from their apartments during the emergency. The district court explicitly based its determination of the amount of those costs on "the testimony of the witnesses offered at the hearing." Appellants bear the burden of providing any transcripts "deemed necessary for inclusion in the record." Minn. R. Civ. App. P. 110.02, subd. 1(a); *see also Fischer v. Simon*, 980 N.W.2d 142, 144 (Minn. 2022) (mem.) ("It is elementary that a party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented." (quotation omitted)); *see also Custom Farm Servs., Inc. v. Collins*, 238 N.W.2d 608, 609 (Minn. 1976) (stating that "[b]ecause of the absence of a transcript of the district court proceedings, we cannot consider" several errors that the appellants contend occurred, including "sufficiency of the evidence").

Without a transcript, we are unable to evaluate whether the district court made findings at the hearings in addition to those findings set forth in its written order or whether the factual findings in the district court's written order are clearly erroneous. Because the district court properly acted within its discretion to grant the relief it ordered, pursuant to section 504B.425 and the ETRA statute, and because landlords failed to provide an adequate record to allow for review of the underlying facts guiding the district court's exercise of discretion, we must affirm the district court's damages award.

Affirmed.