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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0954**

Ride Auto Co.,
Respondent,

vs.

Luis Silva Ibanez,
Appellant.

**Filed November 13, 2012
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Dakota County District Court
File No. 19HA-CV-11-5531

Robert J. Bruno, Robert J. Bruno, Ltd., Burnsville, Minnesota (for respondent)

Nixon Ayeni, Bloomington, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

On appeal from a grant of summary judgment in this lease dispute in favor of
respondent landlord, appellant tenant argues that (1) there are material facts in dispute;

and (2) the district court erred in doubling respondent's award for attorney fees. We affirm in part, reverse in part, and remand.

FACTS

On May 30, 2011 appellant Luis Silva Ibanez signed a written Monthly Rental Agreement (lease), leasing a portion of respondent Ride Auto Co.'s property, consisting of one garage bay and one parking spot for \$900 per month. The lease provided that the lessee give the lessor a written notice of intent to vacate two months in advance or two months of lease payment upon vacating. The lease further provided that the lessor would be entitled to collect all expenses and costs, including reasonable attorney fees, in enforcing the terms and conditions of the agreement. After appellant signed the lease, respondent purchased supplies worth \$2,058.01 on behalf of appellant because appellant did not have credit with vendors.

Appellant vacated the leased premises on August 16, 2011. At the time, he was in default of the terms of the lease for failure to pay rent for the months of June and July 2011, in the amount of \$1,800. No notice of intent to vacate was given, so, according to the lease terms, appellant was required to pay rent for August and September 2011 in the amount of \$1,800.

Respondent filed a complaint, alleging breach of contract and requesting reasonable attorney fees, costs, and disbursements. Respondent then moved for summary judgment based on an affidavit from its president, the lease document signed by appellant, several previous leases signed by appellant, respondent's certificates of rent paid for the years 2008-2010, and receipts for supplies purchased. Appellant served his

responsive papers, along with a cross-motion for summary judgment and a motion to amend his answer and add a counterclaim six days before the motion hearing on respondent's motion was scheduled.

In his cross-motion for summary judgment, appellant alleged that there was no contract. In his motion to amend his answer and add a counterclaim, he alleged that: (1) he never entered into a lease with respondent; (2) respondent's president physically attacked him, which is why he left his employment and vacated the premises; (3) if there was a lease, it was fraudulent; and (4) respondent never purchased supplies for him. Finally, appellant's counterclaim asserted claims for assault, intentional infliction of harm, and damages resulting from the alleged assault of appellant by respondent's owner and president.

Following the summary judgment hearing, the district court filed an order in which it noted that appellant's motion to amend his answer and add a counterclaim "is not a motion but appears to be just another Answer. It does not contain any of the required information for a motion." The court went on to conclude that appellant's "responses and countermotion were not timely served." The district court granted respondent's motion for summary judgment and held that respondent was entitled to judgment in the amount of \$7,475.01, plus costs and disbursements, and attorney fees of \$1,817. Appellant challenges the summary judgment, arguing that there are genuine issues of material fact and that the district court erred in awarding attorney fees twice.

DECISION

I. Summary Judgment

The district court must grant summary judgment when, based on the entire record, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. This court reviews the district court's decision de novo, to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Savela v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011). The district court does not decide questions of fact or weigh evidence on a summary-judgment motion. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). Evidence is viewed in the light most favorable to the nonmoving party. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

No genuine issue of material fact exists when a party fails to present evidence that is “sufficiently probative with respect to an essential element of the . . . party’s case to permit reasonable persons to draw different conclusions.” *DLH*, 566 N.W.2d at 71; *see also Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (“[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.” (emphasis omitted)).

Here, as the district court noted, appellant’s motion to amend his answer and add a counterclaim did not meet the requirements of a motion; therefore, the district court did not grant appellant leave to amend his answer. Because appellant’s original answer did not assert that there was not a lease or that the lease was fraudulent, these issues were not

properly before the district court. The original answer did assert that appellant “has worked in the same location for years” and that he was “forced to leave the location due to the tortious act” of respondent’s president. But appellant offered no affidavit or other evidence to support these claims or to contradict the evidence respondent submitted to the district court. Respondent supported its motion for summary judgment with a sworn affidavit from the president of the company, signed lease documents, certificates of rent, and receipts for goods purchased. “When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05; *see also Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (“Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.”). Because appellant presented no admissible evidence showing there was a genuine issue for trial, the district court properly granted respondent’s motion for summary judgment.

II. Attorney Fees

Appellant argues that the district court erred in awarding respondent both judgment in the amount of \$7,475.01, which included an award of \$1,817 for attorney fees, and also attorney fees in the amount of \$1,817. *See* the district court’s order (granting \$1,817 for attorney fees as part of the “Judgment in the amount of \$7,475.01, plus costs and disbursements,” and stating that respondent was “entitled to recover attorney’s fees in the amount of \$1,817”).

While acknowledging that this was an “obvious error,” respondent argues that appellant should not be allowed to raise this issue for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that reviewing courts generally consider only issues that were “presented and considered by the trial court”). Under Minn. R. Civ. App. P. 103.04, this court may address issues as the interests of justice require. Therefore, we affirm the district court’s order granting respondent summary judgment, but reverse and remand for the district court to correct its clerical error under Minn. R. Civ. P. 60.01 and to enter judgment in the amount of \$7,475.01, plus statutory costs and disbursements.

Affirmed in part, reversed in part, and remanded.