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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-0729**

Affordable Home Builders, Inc.,  
Respondent,

vs.

Bear Road LLC,  
Defendant,

Gregory P. Smith,  
Appellant.

**Filed December 16, 2019  
Affirmed in part, reversed in part, and remanded  
Cochran, Judge**

Morrison County District Court  
File No. 49-CV-18-1576

Jonathan D. Wolf, Rinke Noonan, St. Cloud, Minnesota (for respondent)

A. Chad McKenney, Bradley D. Hendrikson, Donohue McKenney, LTD., Maple Grove,  
Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and  
Smith, John P., Judge.\*

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

## UNPUBLISHED OPINION

COCHRAN, Judge

Appellant Gregory P. Smith challenges the district court's grant of summary judgment in favor of respondent Affordable Home Builders, Inc., arguing that genuine issues of material fact exist regarding the election of remedies and the appropriate amount of damages under a contract for deed. Because genuine issues of material fact exist regarding the amount owed under the contract, we reverse and remand for further proceedings.

### FACTS

In March 2017, appellant Gregory P. Smith and defendant Bear Road LLC (collectively, the buyers) entered into a contract for deed with respondent Affordable Home Builders, Inc. (AHB) to purchase a property. The contract required the buyers to make monthly payments to AHB for one year and then a balloon payment in March 2018. It is undisputed that the buyers defaulted on the contract by failing to make several monthly payments and the balloon payment.

Among other terms, the contract provided that if the buyers defaulted, AHB could cancel the contract or "elect any other remedy available at law or in equity." An addendum to the contract further provided that upon default AHB could immediately demand the entire unpaid balance of the purchase price plus interest and commence an action to collect any amounts due. A second addendum contained the following provision:

If cancellation of the Contract for Deed occurs or the businesses close for more than consecutive 7 days, at the option of the Seller, the assignment of all income and rents shall be

enforced and Seller shall have full right to re-open an[d] protect the businesses.[<sup>1</sup>]

The second addendum further provided that if AHB were to exercise this provision, it was required to assign the income earned in operating the business first to the “costs of taking control and managing the Property” and then to the “sums secured by the Contract for Deed.”

In June 2018, AHB served a summons and complaint against Smith and Bear Road for breach of contract and unjust enrichment. AHB sought damages for amounts due and owing under the contract.<sup>2</sup> Alternatively, AHB sought a judicial determination that AHB was entitled to cancel the contract. In November 2018, AHB moved for summary judgment.

In opposing the motion for summary judgment, Smith argued that a genuine issue of material fact existed regarding which remedy AHB had elected. Smith argued that, under the election-of-remedies doctrine, AHB was precluded from making a claim of damages because AHB had retaken possession of the property and effectively cancelled the contract. Smith alleged through affidavits and supporting documents that Bear Road turned over the keys to the property to AHB and that agents of AHB were operating a business on the property. AHB ultimately conceded at the summary-judgment motion hearing that it reopened a business on the property, but argued that it was allowed to do so

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<sup>1</sup> The “businesses” referenced in the contract are apparently a bar/restaurant located on the property.

<sup>2</sup> Bear Road did not participate in district court and is not participating in this appeal.

under the second addendum and argued that its breach-of-contract claim was consistent with the election-of-remedies doctrine and the contract itself. In response, Smith continued to maintain that the election-of-remedies doctrine precluded AHB from seeking monetary damages because it had repossessed the property. Alternatively, he argued that a genuine issue of material fact existed regarding the amount of income AHB had earned by operating a business on the property and whether any of that income was required to be used to offset the outstanding balance of the contract debt under the second addendum. Moreover, Smith argued that there was a factual dispute regarding whether a \$5,000 payment made by Smith to AHB in February 2018 must be deducted in the calculation of any amounts owing under the contract.

The district court granted AHB's motion for summary judgment and entered a judgment against Smith for the full amount due under the contract as calculated by AHB in its motion filings. The order and judgment do not address or reflect any income made by AHB from operating a business on the property and do not consider the \$5,000 payment that Smith made to AHB in February 2018 prior to the filing of the complaint.

Smith appeals.

## **D E C I S I O N**

A district court must grant summary judgment if the “movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. Appellate courts review the grant of summary judgment de novo to determine “whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*,

898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). To preclude summary judgment, a “genuine issue” of material fact must be established by substantial evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). A reviewing court views the evidence “in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). “All doubts and factual inferences must be resolved against the moving party.” *Montemayor*, 898 N.W.2d at 628 (quotation omitted). Summary judgment is “inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Id.* (quotation omitted).

Smith argues that the district court erred in granting summary judgment in AHB’s favor. Smith contends that genuine issues of material fact exist regarding the election of remedies and, alternatively, regarding the appropriate amount of damages. We address each issue in turn.

**I. No genuine issue of material fact exists regarding the election of remedies.**

Smith argues that the district court erred in granting summary judgment because genuine issues of material fact exist regarding whether the election-of-remedies doctrine precludes AHB from seeking damages for the outstanding debt under the contract. He maintains that genuine issues of material fact exist regarding whether AHB effectively cancelled the contract by retaking possession of the property and operating a business there. We are not persuaded.

The election-of-remedies doctrine applies where “a party adopts one of two or more inconsistent remedies.” *Kosbau v. Dress*, 400 N.W.2d 106, 110 (Minn. App. 1987). The

purpose of the doctrine is “not to prevent recourse to a potential remedy but to prevent double redress for a single wrong.” *Id.* “It is for this reason that once an available remedy is taken to its conclusion, the party cannot thereafter assert a new theory to enhance recovery.” *Nw. State Bank, Osseo v. Foss*, 197 N.W.2d 662, 666 (Minn. 1972). As applied to contracts, the election-of-remedies doctrine requires a plaintiff “to choose whether to affirm or disaffirm a contract.” *Loppe v. Steiner*, 699 N.W.2d 342, 349 (Minn. App. 2005). But, “[g]enerally, a party is not bound by an election unless he has pursued the chosen course to a determinative conclusion or has procured advantage therefrom, or has thereby subjected his adversary to injury.” *Kosbau*, 400 N.W.2d at 110 (quotation omitted).

Consequently, when a buyer under a contract for deed defaults, the seller has an option of remedies. “The law in this state is clear that when there is a default in the performance of a contract for deed for the purchase of real estate the [seller] has his option of suing on the contract or canceling the same.” *Wayzata Enterprises, Inc. v. Herman*, 128 N.W.2d 156, 158 (Minn. 1964). Thus, because cancellation of the contract is inconsistent with remedies such as monetary damages or specific performance, a seller who chooses to cancel a contract is prevented from seeking breach-of-contract remedies. *See Rudnitski v. Seely*, 452 N.W.2d 664, 666 (Minn. 1990) (“Ordinarily when [the seller chooses to cancel the contract], the [seller] will be held to have elected a remedy and will thereafter be prevented from receiving double recovery by seeking damages for breach of contract.”); *Kosbau*, 400 N.W.2d at 108 (“Specific performance and cancellation are inconsistent remedies because the former assumes and affirms the contract while the latter denies or unmakes it.”).

Smith argues that a genuine issue of material fact exists regarding whether AHB pursued the remedy of cancellation prior to bringing its breach-of-contract claim and seeking damages. He maintains that by taking possession of the property, and by earning income from operating a business on the property, AHB elected to cancel the contract and is precluded by the election-of-remedies doctrine from bringing its breach-of-contract claim. AHB counters that the contract expressly allowed it to retake possession of the property. Thus, AHB maintains that there is no genuine issue of material fact regarding what remedy it elected because AHB's actions that purportedly demonstrate that it cancelled the contract were specifically permitted by the terms of the second addendum, and there is no evidence in the record that it disaffirmed the contract.

We conclude that no genuine issues of material fact exist regarding the election of remedies and that there are no grounds for reversing the district court on this basis. As argued by AHB, the contract for deed expressly allowed it to take possession of the property and operate the business under these circumstances. Smith agreed to the second addendum that authorized these actions. Consequently, AHB has not pursued inconsistent remedies. In summary, even looking at the record in the light most favorable to Smith, AHB was following the contract provisions when it took possession of the property and re-opened for business, and could not have disaffirmed the contract by doing so. Thus, there is no genuine issue of material fact regarding whether AHB pursued inconsistent remedies.<sup>3</sup>

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<sup>3</sup> Our decision only reflects whether there exists a genuine issue of material fact regarding the election of remedies at the time of the district court's judgment. We do not address any

**II. A genuine issue of material fact exists regarding the appropriate amount of damages under the contract.**

Smith next argues that the district court erred in granting summary judgment in AHB's favor because there exists a genuine issue of material fact as to the amount of the unpaid debt under the contract. Specifically, he contends that there is a genuine issue of material fact regarding how much AHB earned operating a business on the property after it took possession under the second addendum and how much of those earnings must be applied to reduce the buyers' indebtedness. Smith also argues that there exists a genuine issue of material fact regarding whether the \$5,000 payment to AHB in February 2018 should offset the contract debt.

AHB argues that the district court did not err in granting summary judgment for the full amount of the unpaid debt as calculated by AHB without considering any income AHB earned by its operation of the business. With regard to the \$5,000 payment, AHB acknowledges the payment but claims that its calculation of the unpaid debt included the payment. We find Smith's argument that there is a genuine issue of material fact regarding the amount of the unpaid debt owing to be persuasive.

The contract for deed provides that AHB must assign the income it earns in operating the business first to the "costs of taking control and managing the Property" and then to the "sums secured by the Contract for Deed." AHB asserts that it has not made

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other right of the parties under the contract, including any right of Smith to retake possession of the property or any right of AHB to maintain possession after the entry of final judgment.



sufficient income operating the business to offset any of the contract debt. But there is no information in the record to support this assertion. This court has said:

To survive summary judgment, the nonmoving party generally has the burden to show that a genuine issue of fact exists. But when the nonmoving party has been allowed only minimal discovery and the information that party needs to survive summary judgment is in the moving party's sole possession, summary judgment may be premature. The relative availability of evidence to the parties is a circumstance to be considered in determining what should be required for making a submissible case.

*U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. App. 2000) (quotations and citations omitted), *review denied* (Minn. Oct. 25, 2000).

In reviewing the record, we conclude that the district court erred by granting summary judgment on the issue of damages. Smith submitted evidence that demonstrated that AHB was operating a business on the property. AHB conceded that it was conducting business there after taking possession of the property. But, there is no evidence in the record regarding AHB's income from operating the business, a necessary consideration in determining whether any of the income from the business is available to offset the outstanding contract debt. Considering the evidence that AHB was operating a business on the property, and the lack of evidence regarding AHB's financial gains (or losses) from operating that business, we conclude that Smith meets his burden of presenting a genuine issue of material fact regarding the appropriate measure of damages under the contract.<sup>4</sup>

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<sup>4</sup> We also observe that Smith's attorney noted at the summary-judgment hearing that little discovery had been conducted, and that any evidence about AHB's income from operating the property, if any, would be in AHB's possession.

*See DLH, Inc.*, 566 N.W.2d at 69 (“When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial.” (quotation omitted)). We reverse and remand the district court’s judgment for further proceedings regarding damages.

On remand, the district court should also consider whether the judgment should be reduced by the \$5,000 that Smith paid AHB. The payment does not appear to be in dispute, but the district court’s findings, order, and judgment do not appear to reflect that the amount was previously paid.

**Affirmed in part, reversed in part, and remanded.**