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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1488**

David Timp, et al.,
Respondents,

vs.

Deborah Gibbs, et al.,
Appellants.

**Filed August 10, 2020
Affirmed
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CV-18-10591

Brandon M. Schwartz, Michael D. Schwartz, Schwartz Law Firm, Oakdale, Minnesota (for respondents)

Ryan Simafranca, Simafranca Law Office, Minnetonka, Minnesota (for appellants)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

SEGAL, Chief Judge

Appellants challenge the district court's grant of summary judgment in favor of respondents and denial of their opposing motion for summary judgment in this declaratory judgment action. The suit was filed by respondents to obtain a declaration that they were

not in material breach of a settlement agreement and to vacate a confession of judgment. The confession of judgment had been filed by appellants on the ground that respondents had breached the settlement agreement and were in default. Appellants also claim that the district court erred in its award of attorney fees to respondents. We affirm.

FACTS

Appellants Deborah and Charley Gibbs are the former landlords of respondents David Timp and Sherry Anderly. The landlord-tenant relationship began in May 2013 and ended in March 2016. Following the termination of the landlord-tenant relationship, the Gibbises sued Timp and Anderly for breach of contract and to recover for damage caused to the property leased to Timp and Anderly. In December 2017, the parties entered into a settlement agreement (Agreement) to resolve the claims. Timp and Anderly agreed to pay the Gibbises the sum of \$75,000, plus simple, non-compounded interest, pursuant to an agreed-upon payment schedule. The relevant portion of the Agreement¹ is as follows:

1. Timp shall pay Gibbs the sum of Seventy Five Thousand Dollars (\$75,000.00) (the “Settlement Amount”), payable as follows: Beginning no later than the first (1st) calendar day of February 2018 and no later than the first calendar day of each succeeding month until the first (1st) calendar day of January 2019, Timp shall on a calendar monthly basis and by electronic transfer pay to Gibbs the sum of Six Thousand Two Hundred Fifty Dollars (\$6,250.00), together with simple, non-compounded interest. . . .

2. The Parties agree that in the event Timp does not pay the Settlement Amount as prescribed in [the agreement], Timp shall confess judgment, in the form of an executed confession of judgment as described in [the agreement] below, in favor of Gibbs in the principal amount of One Hundred

¹ The Agreement references Timp and Anderly collectively as simply “Timp.”

Thousand Dollars (\$100,000.00). . . . The Date of Default shall be the actual date, if any, when the third (3rd) of any three (3) Settlement Amount monthly installment payments have not been paid by Timp by electronic transfer to Gibbs either by (a) the due date of the first calendar day of that payment's calendar month or (b) in full by their respective due date.

The Agreement included a signed confession of judgment in which Timp and Anderly agreed to pay the Gibbses the sum of \$100,000 in the event that they failed to pay the settlement amount as prescribed in the Agreement. The Agreement also contained a provision that if either party "commences an action to enforce this Agreement, the substantially prevailing party in such action shall be entitled to receive his or her reasonable attorney's fees, costs, disbursements, and costs of enforcement."

Timp and Anderly subsequently agreed to split the monthly payments. Timp agreed to pay 80%, and Anderly was responsible for the remaining 20%. Timp made his first three payments via electronic wire transfer and each payment was received by the Gibbses prior to the first of the month. On January 29, 2018, Anderly attempted to make her first payment in the amount of \$1,335.06. She discovered that her bank would only allow her to transfer up to \$1,000 at a time, and that she would not be able to transfer the remaining \$335.06 until the \$1,000 payment was cleared by the Gibbses' bank. She contacted the Gibbses and offered to transfer the remainder as soon as the initial \$1,000 payment cleared or, in the alternative, to provide a check. The Gibbses did not respond to her email directly, but their attorney emailed her attorney and stated that the Gibbses required strict compliance with the terms of the Agreement.

On January 31, 2018, Anderly emailed the Gibbsses to explain that she was previously unaware of the \$1,000 transfer limit, that she had provided a certified check for the remaining balance of that month's payment, and that she would arrange to make future payments entirely through electronic transfer. The Gibbsses received and cashed the certified check. With the exception of the portion of the February 2018 payment made by certified check, Anderly made all of the other settlement payments via electronic transfer.

Anderly's payments for the months of February through March² included the following:

February payment: Anderly submitted a request on January 31 to transfer \$1,000 to the Gibbsses' bank account; the request for payment was posted against her account on February 1; and posted to the Gibbsses' account on February 5.

March payment: Anderly submitted a request on February 28 to transfer \$1,000 to the Gibbsses' bank account; the request was initially rejected because she had insufficient funds, but she transferred sufficient funds and resubmitted the transfer request on March 1; the payment was posted against her account on March 2, and posted to the Gibbsses' account on March 6.

April payment: Anderly submitted a request on March 31 to transfer \$1,000 to the Gibbsses' bank account; the payment was posted against her account on April 2 and the payment was posted to the Gibbsses' account on April 4.

On April 17, 2018, the Gibbsses filed the confession of judgment with the district court claiming that Timp and Anderly were in default under the Agreement. Their basis for the claim is that Anderly paid part of the February payment by cashier's check instead

² Anderly's payments for the sums she owed above \$1,000 per month were all paid and received by the Gibbsses prior to the first of the month.

of electronic transfer and that her payments were not received by them in full by the first of each month.

Although payment of the June and July amounts was delayed after the filing of the confession of judgment, Timp and Anderly made all remaining payments to the Gibbsses and it is undisputed that they paid the full amount called for in the Agreement, including interest, in the amount of \$76,959.50.

In response to the filing of the confession of judgment in the underlying action, Timp and Anderly commenced this lawsuit, seeking a declaratory judgment that they had fully performed pursuant to the material terms of the Agreement and that the confession of judgment should, therefore, be vacated. They also sought reasonable attorney fees and costs pursuant to the terms of the Agreement.

Both parties moved for summary judgment. The Gibbsses argued that they were entitled to entry of the confession of judgment in the amount of \$100,000, with Timp and Anderly receiving \$57,307.96 credit, leaving the balance of \$42,692.04 owed to the Gibbsses above and beyond the full settlement sum paid by Timp and Anderly.³ Following a hearing, the district court granted summary judgment to Timp and Anderly, denied the Gibbsses' motion for summary judgment, and awarded attorney fees and costs to Timp and Anderly. The Gibbsses appeal.

³ This number was arrived at by subtracting \$19,651.54 (the amount paid up to the date of default) from \$76,959.50 (the total amount paid by Timp and Anderly pursuant to the terms of the Agreement).

DECISION

I. The district court did not err in granting summary judgment in favor of Timp and Anderly and denying summary judgment in favor of the Gibbsses.

“On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). This court views “the evidence in the light most favorable to the party against whom summary judgment was granted, and reviews de novo whether a genuine issue of material fact exists.” *Id.* at 76-77. We also “review de novo whether the district court erred in its application of the law.” *Id.* at 77.

“A settlement agreement is a contract,” and this court reviews “the language of the contract to determine the intent of the parties.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010) (citation omitted). When the language is clear and unambiguous, the court enforces the agreement of the parties as expressed in the language of the contract, “even if the result is harsh.” *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003). Additionally, when contract terms are unambiguous, summary judgment is appropriate. *Twin City Constr. Co. v. ITT Indus. Credit Co.*, 358 N.W.2d 716, 718 (Minn. App. 1984).

The Gibbsses argue that the district court erred by determining that Timp and Anderly did not materially breach the Agreement. They claim that Anderly breached the Agreement in two ways: (1) she made part of the February payment by a cashier’s check instead of making the full payment by electronic transfer; and (2) her payments for the

months of February through April were not received by the first of the month. They also point to a substantial delay by Timp and Anderly in making the June and July payments after the confession of judgment was filed.

In granting summary judgment for Timp and Anderly, the district court determined that there was no material breach of the Agreement. The district court found that Anderly's February payment by cashier's check was not an act of default because a cashier's check is as good as cash. The district court further noted that nothing in the Agreement expressly required that payment actually be *received* by the Gibbsses by the due date. The district court noted that the Agreement merely required payment and that Anderly, by initiating payment on or before the due date, complied with the terms of the Agreement even though the payments may not have been received in the Gibbsses' bank account until a few days later. Finally, the district court determined that the delay in the May and June payments was excused by the improper filing of the confession of judgment by the Gibbsses.

We agree. The mere existence of a breach, even a breach involving an express provision of a contract, is not by itself enough to constitute a material breach. *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728-29 (Minn. App. 2011), *review dismissed* (Minn. Aug. 12, 2011). A material breach only occurs when a party breaches a contract and the breach is "significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial)," and excuses the aggrieved party from further performance and affords the party the right to sue for damages. *Id.* at 728.

A material breach "goes to the root or essence of the contract." *Id.* (quotation omitted). Here, the Gibbsses acknowledged that the most important part of the Agreement

was the payment of the \$75,000. Anderly's one-time payment of \$335.06 by cashier's check instead of electronic transfer still delivered the funds to the Gibbsses in a timely manner and constitutes a small fraction of the \$76,959.50 paid by Timp and Anderly to the Gibbsses. This does not constitute a material breach. *See Coddon v. Youngkrantz*, 562 N.W.2d 39, 42-43 (Minn. App. 1997) (determining that a single irregular payment does not constitute a material breach of a contract), *review denied* (Minn. July 10, 1997).

With regard to the argument that Anderly's payments were late for the months of February through March because they were not posted into the Gibbsses' bank account until a few days after the first of the month, the Agreement simply provides that Timp and Anderly "shall pay" to the Gibbsses the sum of \$6,250 plus interest "no later than the first calendar day" of each month. The Agreement does not provide that the payments had to post to the Gibbsses' account by the due date.⁴ Without an express provision in the Agreement that the payments must be received by the Gibbsses by the due date, we cannot

⁴ The Gibbsses argue on appeal that Article 4A of the Uniform Commercial Code (UCC) should be applied in interpreting the terms of the Agreement. Notably, the Gibbsses fail to provide any basis or legal authority to support their argument and the issue was only raised in an errata sheet filed after the Gibbsses' primary brief was submitted and in their reply brief. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is forfeited unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted); *see also Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (stating that, generally, issues not raised or argued in appellant's principal brief cannot be raised in a reply brief). We fail to see how the UCC is applicable to this case, which involves a settlement agreement concerning payment for damage caused to leased premises, and thus find no prejudicial error here.

conclude that Timp and Anderly materially breached the contract by initiating the payments by the due date.

Finally, the Gibbsses argue that the district court erred by determining that the late June and July payments were justified. After the Gibbsses filed the confession of judgment, the June and July payments were delayed until September. The district court determined that the act of filing the confession of judgment was a repudiation of the contract that justified the late payment. Again, we agree with the district court and conclude that, under these circumstances, Timp and Anderly were justified in delaying the June and July payments.⁵ *See Instrumentation Servs., Inc. v. Gen. Res. Corp.*, 283 N.W.2d 902, 908-09 (Minn. 1979) (stating that a non-breaching party who has only partially completed its performance may act on an anticipatory breach without completing performance).

The district court therefore did not err in granting summary judgment to Timp and Anderly, denying summary judgment to the Gibbsses and vacating the confession of judgment.

II. The district court did not abuse its discretion in awarding attorney fees.

Finally, the Gibbsses argue that the district court abused its discretion in its award of attorney fees to Timp and Anderly in the amount of \$29,806.25. “We will not reverse the district court’s decision on attorney fees absent an abuse of discretion.” *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21,

⁵ Because we affirm the district court’s ruling that there was no material breach of the Agreement by Timp and Anderly, we need not address the Gibbsses’ argument that the district court erred in also finding substantial compliance with the Agreement as a secondary ground for granting summary judgment in favor of Timp and Anderly.

2007). A district court abuses its discretion when it misapplies the law. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

Here, the Agreement expressly provided that if either party commenced an action to enforce the Agreement, the substantially prevailing party was entitled to attorney fees and costs. The district court determined that Timp and Anderly were entitled to attorney fees and costs, and directed them to file documentation to support their claimed attorney fees. On May 22, 2019, Timp and Anderly's attorney filed an affidavit in support of attorney fees that outlined the hours spent on the case, his hourly rate, his legal assistant's hourly rate, and his qualifications. The Gibbsses did not file any response to the affidavit or claim for attorney fees.

The Gibbsses assign two errors to the district court's determination. The Gibbsses first assert that the district court "failed to apply the lodestar method and perform its responsibility to determine the number of hours reasonably expended multiplied by a reasonable rate." This is the entirety of the Gibbsses' argument on this point, and does not contain any citation to legal authority or further explanation of the alleged deficiencies in the district court's analysis. In its order awarding attorney fees, the district court stated that it was applying the "lodestar method" to evaluate the claim, explained the relevant factors, and determined that the claimed amount of \$29,806.25 was reasonable based on the relevant factors and the "accurate, reliable, and reasonable" exhibits provided in support of the award.⁶ *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542-43

⁶ Timp and Anderly note that the Gibbsses sought an attorney fees award in the amount of \$81,220 in their motion for summary judgment.

(Minn. 1986) (describing the lodestar method). On this record, we discern no abuse of discretion by the district court.

The Gibbsses next argue that they were entitled to a jury trial on the issue of attorney fees because the claim for fees was contract-based. They rely on *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC* for this proposition. 813 N.W.2d 49, 58 (Minn. 2012). In that case, one party demanded a jury trial on the issue of attorney fees, which was denied. *Id.* at 53. The party appealed, and the supreme court determined that “a claim for a monetary payment under a contractual indemnity provision is a legal claim with” the right to a jury trial. *Id.* at 57. But in this case, the Gibbsses expressly waived a jury trial on the merits and never demanded a jury trial on the issue of attorney fees. The Gibbsses thus forfeited any right they may otherwise have had to have a jury determine the attorney fees issue. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (noting that a party forfeits a right by failing to make a timely assertion of that right).

Affirmed.